TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 154

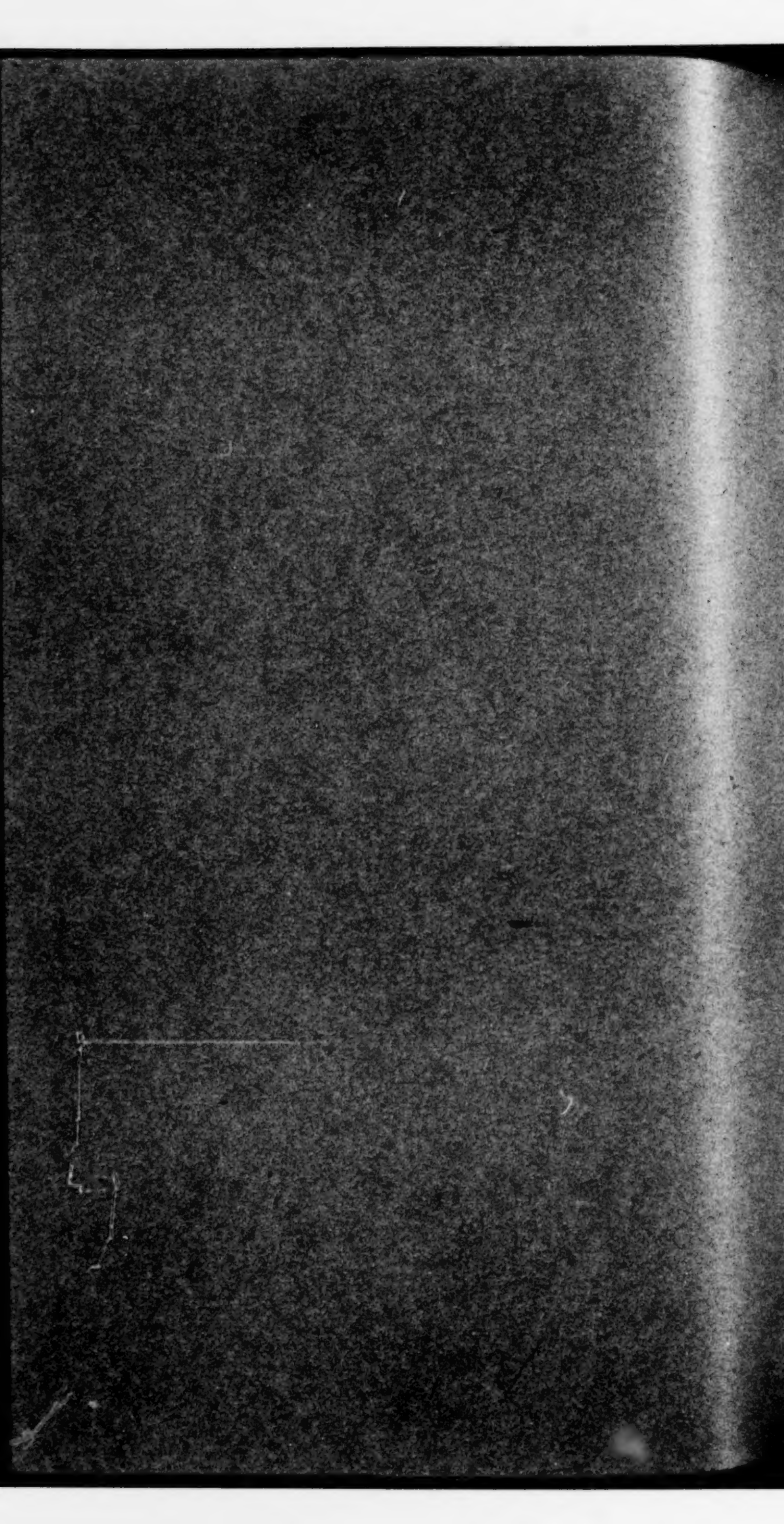
THE SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD, PLAINTIFF IN ERROR,

vs.

LILLIAN E. BECK.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF KANSAS.

FILED [illegible]



(17,625.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 194

THE SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, PLAINTIFF IN ERROR,

vs.

LILLIAN H. BECK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the United States Circuit Court of Appeals.

LILLIAN H. BECK, Plaintiff,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant.

Stipulation as to Printing of Record.

It is hereby stipulated by and between C. B. Nolan, Esq., counsel for Lillian H. Beck, and Albert I. Loeb, counsel for Supreme Lodge, K. of P., that there be omitted in the printing of the record by the clerk of the circuit court of appeals the following portions of the record as compiled by G. W. Sproule, Esq., clerk of the circuit court, to wit:

(1.) The summons.
(2.) Order of court granting defendant additional time to appear.
(3.) The petition for removal to the United States court.
(4.) The bond on removal to the United States court.
(5.) The order for removal to United States court.
(6.) The certificate of Finlay McRea, clerk of the district court of the first judicial district.

(7.) All that portion of the original application blank of
2 Frank H. Beck which is known as the medical examination, beginning after his signature to the application for insurance with the words "Questions to be answered by applicant and recorded by medical examiner" (it being understood that the application for membership down to and including the signature of Frank H. Beck be printed).

It is further stipulated and agreed that inasmuch as the "motion to instruct the jury" occurs twice in the record as made up by Mr. Sproule, clerk of the circuit court, that it be only printed once, and that it be omitted where it occurs in the judgment-roll and be printed where it occurs as part of the "bill of exceptions," and where omitted there be inserted the words, "Here follows motion to instruct the jury," as printed on page — (giving the page of the printed record on which the same occurs).

Helena, Montana, August 19, 1898.

C. B. NOLAN,
Attorney for Lillian H. Beck.
ALBERT I. LOEB,
Attorney for Supreme Lodge, Knights of Pythias.

(Endorsed:) Filed Aug. 25, 1898. F. D. Monckton, clerk.

3 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

LILLIAN H. BECK, Plaintiff and Appellee,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant and Appellant.

Order Extending Time to Docket Cause.

Good cause being shown, it is ordered that the time for the filing of the record on appeal in said cause be, and the same hereby is enlarged and extended until August 15th, 1898.

Dated Helena, Montana, July 22, 1898.

HIRAM KNOWLES,
United States District Judge for the District of Montana.

(Endorsed:) Filed July 27, 1898. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

4 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

LILLIAN H. BECK, Plaintiff,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant.

Caption.

Be it remembered that on the 29th day of October, 1897, the defendant herein filed a transcript on removal from the State court of said cause; which said transcript is in the words and figures as follows, to wit:

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

LILLIAN H. BECK, Plaintiff,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant.

Complaint.

The plaintiff above named complains of the defendant, and for cause of action alleges:

5 I.

That there is in existence in the United States of America a voluntary society, consisting of a large number of persons, organized, among other things, for the purpose of mutual benefit insurance, which society is called, denominated, and generally known by the name of the Supreme Lodge, Knights of Pythias of the World.

II.

That said supreme lodge is composed of a large number of subordinate lodges in the several towns, localities, and districts throughout the United States, where the same are organized, and that on or about the 15th day of April, 1895, there was, and now is, one of such subordinate lodges in the city of Helena, Lewis and Clarke county, State of Montana, known and designated as the "Ivy" lodge No. 24, Knights of Pythias.

III.

That said defendant, for the purpose of carrying on the insurance branch of its business, created an instrumentality and agency for the doing of said work, known as the Endowment rank, Knights of Pythias of the World, which said instrumentality and agency was and is under the jurisdiction and control, and subject to the direction and management, of said defendant.

IV.

That on the 15th day of April, 1895, the said defendant, at the city of Helena, in consideration of the dues and assessments to be paid by one Frank E. Beck, and in consideration of the said
6 Frank E. Beck becoming a member of the said "Ivy" lodge, No. 24, as aforesaid, made, executed, and issued a policy of insurance in writing, copy of which policy is hereto annexed and marked Exhibit "A," and made part of this complaint, and thereby insured the life of the said Frank E. Beck for the sum of three thousand dollars ($3,000.00), and made said sum payable to the plaintiff above named.

V.

That the plaintiff above named at said time, and until his death as hereinafter set forth, was the wife of the said Frank E. Beck.

VI.

That on the 31st day of October, 1896, the said Frank E. Beck died.

VII.

That thereafter, on. to wit, the — day of December, 1896, the plaintiff furnished said defendant with proof of the death of the said Frank E. Beck, and in all respects performed all the conditions of said policy of insurance on her part.

VIII.

That thereupon it became the duty of said defendant to levy an assessment upon each one of the members belonging to the subordinate lodges of said defendant, for the purpose of raising the sum of three thousand ($3,000) dollars, the amount of insurance on the life of said deceased to be paid to the plaintiff herein, but that defend-

ant refused and still refuses to make said levy, and refuses to
7 pay to said plaintiff the said sum of three thousand ($3,000) dollars, although said sum is due and payable from said defendant to the plaintiff.

Wherefore, plaintiff demands judgment against the said defendant for the sum of three thousand ($3,000) dollars, and her costs in this behalf expended.

C. B. NOLAN,
Attorney for Plaintiff.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

Lillian H. Beck, being first duly sworn, upon oath deposes and says that she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof, and that the facts therein stated are true except as to such matters as are stated on information and belief, and as to those matters, she believes it to be true.

LILLIAN H. BECK.

Subscribed and sworn to before me this 13th day of April, 1897.
C. B. NOLAN,
Attorney General, State of Montana.

EXHIBIT "A" (TO COMPLAINT).

F. C. B. F. C. B.

No. 52169. *Certificate of Membership.* Amount, $3,000.

Endowment rank of the order of Knights of Pythias.

This certificate witnesseth, that Frank E. Beck is a mem-
8 ber of section No. 1258 of the Endowment rank, Knights of Pythias of the World, said membership being based upon evidence received that he is a member in good standing of a subordinate lodge of the order of Knights of Pythias, and upon the declarations, representations, and agreements made in his application bearing date of April 1st, 1895, and the statements certified by him therein to the medical examiner, which application is filed in the office of the board of control of the Endowment rank, and made a part of this contract.

In consideration of the payment by said member of the prescribed membership fee, and of the payment hereafter to said Endowment rank of all monthly payments, assessments, and dues as required, and the full compliance with all conditions herein contained, and with the laws governing this rank, now in force or may hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, or the board of control of said rank, and shall be in good standing under said laws, the board of control of the Endowment rank, Knights of Pythias of the World, will pay to Lillian H. Beck, his wife, the sum of three thousand dollars out of the endowment fund

of the rank, in accordance with and under the laws governing the payment of benefits, upon due notice and satisfactory proof of death, and good standing in the rank at time of death, and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions, and limitations subscribed by said member in his application and to the further conditions and agreements hereinafter named; and provided, also, that this certificate shall not
9 have been surrendered by said member or canceled at his request and another certificate issued in accordance with the laws of the rank.

Provided, further, that the beneficiary herein designated shall acquire no interest whatever in the certificate, nor in the endowment fund, until the benefit shall have lawfully accrued by reason of the death of said member and no subsequent change in the beneficiary shall have been made.

In case of the death of said beneficiary during the lifetime of the member, the benefit accruing under this certificate shall be payable as provided in article VI, section 1 of the general laws of the Endowment rank; and it is understood and agreed that any violation of the within-mentioned conditions, or the requirements of the laws now or hereafter in force governing this rank, shall render this certificate and all claims thereunder null and void, and the said Endowment rank shall not be liable for the above sum or any part thereof.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World, at Chicago, Illinois, this 5th day of April, 1895.

J. A. HINSEY,
President of Board of Control.

Attest: H. B. STOLH,
Secretary of Board of Control.

I hereby accept this certificate of membership subject to all the conditions therein contained.

Signature of member: FRANK E. BECK.

10 Dated at Helena this 15th day of April, 1895.

Attest: W. C. RIDDLE,
Sec'y Section 1258, *Endowment Rank, K. of P.*

(Endorsed:) F. C. B. Exhibit "A." F. C. B. Filed April 13, 1897.

(Title of Court, Title of Cause.)

Stipulation Allowing Amendment to Complaint.

It is hereby stipulated and agreed that by the consent of the parties hereto the complaint herein is amended so as to allege "That the defendant is a corporation incorporated under the act of Congress of May 5th, 1870, relating to corporations in the District of Columbia, and reincorporated under the act of Congress of June 29th,

1894, entitled 'An act to incorporate the supreme lodge, Knights of Pythias.'"

Dated May 11th, 1897.

C. B. NOLAN,
Att'y for Pff.
ALBERT I. LOEB,
Att'y for Def.

(Endorsed:) Filed June 1st, 1897.

(Title of Court, Title of Cause.)

Answer.

Now comes the defendant above named and for answer to the complaint herein filed:

11 I.

Admits that the defendant is a corporation incorporated under the act of Congress of May 5, 1870, relating to corporation- in the District of Columbia, and reincorporated under the act of Congress of June 29, 1894, entitled "An act to incorporate the supreme lodge, Knights of Pythias," and avers it has established and maintains as a branch of the order of Knights of Pythias a fraternal benevolent society, known as the Endowment rank, into which those members of the order are admitted who have applied for and received certificates as provided by the laws, rules and regulations made and enacted by the defendant and by the board of control of the said Endowment rank for the government thereof.

II.

Admits that said supreme lodge is composed of a large number of subordinate lodges in the several towns, localities, and districts throughout the United States where the same are organized, and that on or about the fifteenth day of April, 1895, there was, and now is, one of such subordinate lodges in the city of Helena, Lewis and Clarke county, State of Montana, known and designated as the "Ivy" lodge No. 24, Knights of Pythias.

III.

Admits that said defendant, for the purpose of carrying on the insurance branch of its business, created an instrumentality and agency for the doing of said work, known as the Endowment rank, Knights of Pythias, which said instrumentality and agency was and
12 is under the jurisdiction and control and subject to the direction and management of said defendant, and allege that the said defendant has placed the management of said Endowment rank under the direction of the board of control of said rank.

IV.

Answering paragraph four of said complaint, defendant admits that prior to April 1, 1895, the said Beck was a member of Ivy lodge,

Knights of Pythias. That on that date he made written application for membership in the Endowment rank, Knights of Pythias, which application was accepted, and the certificate, a copy of which is attached to complaint, was issued and delivered to him, in which his wife, the plaintiff, was named as beneficiary.

V.

Admits that plaintiff above named at said time and until his death was the wife of the said Frank E. Beck.

VI.

Admits that on the 31st day of October, 1896, the said Frank E. Beck died.

VII.

Answering paragraph seven of said complaint, the defendant admits that proofs of death were furnished to the defendant, but denies that the said Beck performed all the conditions of the said certificate and contract.

VIII.

Defendant denies that it became the duty of the said de-
13 fendant to levy an assessment upon each of the members belonging to the subordinate lodges of said defendant, for the purpose of raising the sum of three thousand dollars or any other sum, but admits that the defendant has refused to pay the plaintiff the amount of the said certificate.

For a defense the defendant alleges that the said Beck, being a member of said lodge, on or about the first day of April, 1895, made and executed a written application for membership in said Endowment rank, which said application was accepted, and was the basis and a part of the contract of membership and of said certificate, as therein expressly agreed and provided. That in and by the terms of said application and contract of membership the said Beck then and there agreed as follows, to wit: "It is agreed that if death shall result by self-destruction, whether sane or insane, voluntary or involuntary, or if death is caused or superinduced by drunkenness, or by the use of narcotics or opiates, or in consequence of a duel, or by the hands of justice, or in violation of or an attempt to violate any criminal law, then the certificate issued upon this application shall be null and void."

That the death of said Beck resulted from self-destruction and that he committed suicide. That prior to said Beck taking his own life said Beck was attempting and did violate the criminal law of the State of Montana. For a further defense the defendant alleges that in and by said application it was provided that the said Beck
should be governed and the contract be controlled by all the
14 laws, rules, and regulations of the Supreme Lodge, Knights of Pythias, and of the board of control of the Endowment rank, governing said rank, then in force or that might thereafter from time to time be enacted by said supreme lodge or board of

control. That at the time of the application and admission to membership in said rank of said Beck there was in force a law duly enacted, relating to and governing the Endowment rank, to wit: "If the death of any member of the Endowment rank heretofore admitted into the first, second, third, and fourth classes, or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then, in such case, the certificate issued to such member, and all claims against said Endowment rank on account of such membership, shall be forfeited."

As a further defense defendant alleges that said Beck, being a member of said lodge, on or about the first day of April, 1895, made and executed a written application for membership in said Endowment rank, which said application was accepted and was the basis and a part of the contract of membership and of said certificate as therein expressly agreed and provided, and that in and by said application it was provided that the said Beck should be governed, and the contract be controlled, by all the laws, rules, and regulations of the Supreme Lodge, Knights of Pythias of the World, and of
15 the board of control of the Endowment rank, governing said rank, then in force, or that might thereafter from time to time be enacted by said supreme lodge or board of control.

That at and prior to the time of the death of said deceased there was in force a law duly enacted by the Supreme Lodge, Knights of Pythias, relating to and governing the Endowment rank, providing as follows: "If the death of any member of the Endowment rank heretofore admitted into the first, second, third, *or* fourth classes, or hereafter admitted, shall result from suicide, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics or opiates, or in consequence of a duel, or at the hand of justice, or violation or attempted violation of any criminal law, then the amount to be paid upon such member's certifiate shall be a sum only in proportion to the whole amount as the matured life expectancy is to the entire expectancy at date of admission to the Endowment rank; the expectation of life based upon the American experience table of mortality in force at the time of such death to govern."

That said Beck committed suicide and that his death resulted from voluntary self-destruction, whereby there accrued to the said beneficiary, under and by virtue of the said law last mentioned, the sum of $138.00 only, which amount was, prior to the commencement of this action, duly tendered to said beneficiary, and which was then and there refused.

16 That the defendant has always been and still is ready and willing to pay the same to the plaintiff, and now pays the same into this court.

Wherefore, the defendant having fully answered the complaint of

the plaintiff herein, prays to be hence dismissed with its costs in this behalf expended.

ALBERT I. LOEB,
Attorney for the Def.

STATE OF MONTANA, *County of Lewis and Clarke,* } ss:

Albert I. Loeb, being first duly sworn, says: I am the attorney for the defendant in this action. I have read the foregoing answer and know the contents thereof, and that the matters and facts therein stated are true of my own knowledge except as to those matters therein stated on information and belief, and as to those I believe it to be true.

The reason why this answer is not verified by an officer of the corporation is that its place of business is at the city of Chicago, in the State of Illinois, and that none of its officers are now within the county of Lewis and Clarke, where I reside.

ALBERT I. LOEB.

Subscribed and sworn to before me this 1st day of May, 1897.
E. C. BOOM,
Notary Public, Lewis and Clarke County, Montana.

17 Service of copy of the within answer admitted this first day of June, 1897.

C. B. NOLAN,
Att'y for Plaintiff.

(Endorsed:) Filed June 1st, 1897.

(Endorsed:) In the circuit court of the United States, ninth circuit, district of Montana. Title of court and cause. Transcript on removal. Filed and entered October 29, 1897. Geo. W. Sproule, clerk.

(Here follows motion to instruct the jury, as printed on page 85.)

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

LILLIAN H. BECK, Plaintiff,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant.

No. 495. In Open Court, May 14, 1898.

Trial.

Counsel for respective parties present as before and trial of cause resumed, and thereupon L. H. Beck and O. G. Beck recalled,
18 and thereupon plaintiff rested, and thereupon the evidence being closed, defendant filed its motion to instruct the jury to render a verdict for the said defendant, and after due consideration motion denied, and thereupon, after argument of counsel and instructions of the court, the jury retired to consider of their verdict,

and having agreed upon a verdict, were subsequently returned into court, and being called all answered to their names as present, and thereupon their verdict filed and ordered entered; at request of defendant jury polled, at which each juror answered that the verdict as read in said cause was his, said verdict being as follows, *to* wit: "We, the jury in the above-entitled cause, find for the plaintiff and assess her damages in the sum of three thousand dollars. Morris Sands, foreman." And thereupon judgment ordered entered in accordance with said verdict, and thereupon, on motion of counsel for defendant, stay ordered granted herein for 42 days pending motion for a new trial, and defendant granted ten days in which to prepare and file bill of exceptions herein.

A true copy of minute order.

GEO. W. SPROULE, *Clerk.*

19 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

LILLIAN H. BECK, Plaintiff,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess her damages in the sum of three thousand dollars.

MORRIS C. SANDS, *Foreman.*

(Endorsed:) Title of court and cause. Verdict. Filed and entered May 14, 1898. Geo. W. Sproule, clerk.

And thereafter, to wit, on May 19, 1898, a judgment was duly entered in said cause as follows, to wit:

20 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

LILLIAN H. BECK, Plaintiff,
vs.
THE SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant.

Judgment.

This action, on the 12th day of May, 1898, came on regularly for trial. The said parties appeared by their attorneys; a jury of twelve persons were regularly impaneled and sworn to try said action; witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence and argument of counsel and instructions of the court, the jury retired to consider their verdict, and subsequently returned into court, and being called answered to their names, and say they find a verdict for the plaintiff against the defendant for the sum of three thousand dollars ($3,000),

and the court having ordered that judgment be rendered on said verdict, wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendant the sum of $3,000, with interest thereon at the rate of 10 per cent. per annum from the date hereof until paid, together with said plaintiff's costs and dis-
21 bursements incurred in this action, amounting to the sum of $40.35.

Judgment rendered this 19th day of May, 1898.
Judgment entered May 19, 1898.

GEO. W. SPROULE, *Clerk.*

A true copy.
Attest:

GEO. W. SPROULE, *Clerk.*

(Endorsed:) Title of court and cause. Judgment. Filed May 19th, 1898. Geo. W. Sproule, clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Montana.

LILLIAN H. BECK
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD. } No. 495.

Certificate to Judgment-roll.

George W. Sproule, clerk of the circuit court of the United States, for the ninth circuit, district of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 19th day of May, 1898.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) Title of court and cause. Judgment-roll. Filed May 19th, 1898. Geo. W. Sproule, clerk.

22 And thereafter, to wit, on the 7th day of June, 1898, a bill of exceptions was duly filed and signed in said cause, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

LILLIAN H. BECK, Plaintiff,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant. }

Bill of Exceptions and Demurrer to Evidence.

C. B. Nolan, Esq., counsel for plaintiff.
Albert I. Loeb, Esq., counsel for defendant.

Be it remembered that the above-entitled case came on for trial on the 13th day of May, 1898, before the court and a jury of twelve

persons, duly impaneled and sworn to try said case, the plaintiff appearing by her counsel, C. B. Nolan, Esq., and the defendant appearing by its counsel, Albert I. Loeb, Esq., whereupon the following proceedings were had and done:

WILLIAM C. RIDDELL, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. LOEB, counsel for defendant:

23 My name is William C. Riddell; I live in Helena, and am holding the position of secretary of section 1258 of the Endowment rank of the Knights of Pythias of the World, located at Helena, Montana. The Endowment rank is a branch of the order of the Knights of Pythias; it is created by the supreme lodge, and the business of the Endowment rank is put into the hands of a board of control, which board of control is composed of two officers of the supreme lodge, and three members of the supreme lodge. The Endowment rank is composed of "sections" scattered throughout the United States. A member of the Endowment rank must be a member in good standing of the Knights of Pythias. The number of section of which I am the secretary is 1258, and is situated at Helena, Montana. The board of control has the affairs of the Endowment rank under their charge; they have the power to enact laws and rules and regulations, lay down a table of assessments for membership and everything connected with the business of the Endowment rank. The board of control gets its power from the supreme lodge. I knew Frank E. Beck in his lifetime; he was a member of Ivy lodge No. 24 of the Knights of Pythias; he made application for insurance in the Endowment rank.

(Witness is shown paper.)

This is the original application of Frank E. Beck for membership in the Endowment rank.

The paper referred to by the witness was marked "Exhibit A, Def't," offered in evidence by defendant's counsel, admitted without objection, read to the jury, and is as follows:

24 EXHIBIT "A" (DEFENDANT'S).

Application for Membership in the Endowment Rank, Knights of Pythias.

To the board of control, Endowment rank, Knights of Pythias:

The undersigned, makes the following application for membership in section No. 1258 of the Endowment rank Knights of Pythias.

I hereby warrant that I am a member of Ivy lodge No. 24, Knights of Pythias of the grand domain of Montana; that dues and other charges against me in said lodge are paid to Mar. 1, 1895, and that all questions herein are truthfully and completely answered.

1. A. Give your name in full: A. Frank E. Beck. B. Post-office address: B. Helena, Montana. C. Present and previous occupation. State clearly the kind of business: C. Present, steam laundry; previous, wool dealer. D. Are you married, single or widower? D. Married.

2. Give the place and date of your birth and present age at nearest birthday. Born at Detroit, State of Mich., on the 7th day of Feb'y, 1861; age nearest birthday, 34.

4. A. Have you ever been a member of the Endowment rank? If so, give section number, and cause of the termination of your membership: A. No. B. Have you now any life insurance or endowment? B. Yes. C. If so, in what order or company? Give the names and amount in each: C. A. O. U. W. $2,000; Woodmen, $3,000; Maccabees, $3,000. D. Have you ever applied to any society, company or agent for insurance without receiving a certificate or policy? If so, state full particulars: D. No.

5. What amount of endowment do you desire, $3,000? $3,000.

6. A. To whom do you want the endowment paid? Give name or names in full and post-office address: A. Lillian H. Beck. B. State the relationship of the person or persons to you. B. Wife.

Persons related to or dependent upon the applicant for support can be named only. (See article VI, sec. 1, General Laws, Rules and Regulations.)

Read carefully the following declaration and agreement, and observe its import:

I hereby declare that I am a member in good standing of the order of the Knights of Pythias, that I am not now a member of the Endowment rank Knights of Pythias, have never been rejected as an applicant thereof, and that I am in sound mental and physical condition; and it is further declared that the foregoing answers and statements, whether written in my own hand or not, together with the answers and statements made, or to be made, to the medical examiner in the continuance of this application are warranted to be full, complete and true, and shall together with all the agreements hereinafter made, form the basis of any certificate of membership issued hereon. It is agreed by myself and binding upon all parties who may hereafter become interested, that if any statement in this application, or to the medical examiner or in any certificate of health that may be hereafter given, or in the proofs of loss, or death, by which any certificate of membership issued hereon matures, is untrue, or if there shall be any failure or neglect to pay any assessments, monthly payments or dues as prescribed by the laws of the rank or order, or severing in any manner whatever my membership or connection with the order or the Endowment rank, said certificate shall be null and void and all right, title and interest in and to the same as well as the rights of my heirs and beneficiaries to the benefits and privileges accruing to members in good standing of this rank shall be forfeited; and I hereby, for myself, my heirs, assigns, representatives and beneficiaries expressly waive any and all provisions of law, now or hereafter in force, pro-

hibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material. The person soliciting or taking this application and also the medical examiner shall be held to be the agents of the applicant as to all answers and statements in this application.

It is agreed that, if death shall result by suicide, whether sane or insane, voluntary or involuntary, or if death is caused or superinduced by the use of intoxicating liquors or by the use of narcotics or opiates, or in consequence of a duel, or at the hands of
27 justice or in violation of or attempt to violate any criminal law, then there shall be paid only such a sum in proportion to the whole amount of the certificate as the matured life expectancy at the time of such death is to the entire expectancy at date of acceptance of the application by the board of control; the expectation of life based upon the American experience table of mortality in force at the time of such death to govern, and it is agreed that active military service, whether in the army or navy, in time of war, shall render the certificate issued upon this application null and void.

It is agreed that no action at law or in equity shall be brought or maintained on any cause or claim arising out of any membership in the Endowment rank Knights of Pythias, or on any certificate issued upon this application unless good and sufficient proof of death is furnished the board of control of the Endowment rank within one year from date of the death of the member, nor shall such action at law be maintained unless suit is commenced within two years from the date of the death of the member.

It is agreed that membership shall not begin, and the certificate of membership issued under this contract shall not be binding or in force and effect until this application has been accepted by the board of control, and all required fees and the first monthly payment has been paid to said board.

In addition to the above provisions, I hereby agree that I will be governed, and this contract shall be controlled by the laws,
28 rules and regulations, enacted by the Supreme Lodge Knights of Pythias and the rules and regulations which may be adopted by the board of control of the Endowment rank governing said rank, now in force or that may hereafter from time to time be enacted by said supreme lodge or board of control or submit to the penalties therein contained.

To all of which I willingly and freely subscribe.

Dated at Helena, this the 1st day of April, 1895.

FRANK E. BECK, *Applicant.*

Applicant must sign in person and with first name in full.

Witness:

W. C. RIDDLE,
Sec'y Sec. No. 1258.

NOTE.—Every blank on this application must be properly filled, and all questions on the medical examiner's form and in the examination, must be answered before sending the application to the board of control. All questions must be answered and application signed in ink.

Pursuant to a stipulation on file between counsel for plaintiff and counsel for defendant, all of the printed constitution and by-laws of the Endowment rank of the Knights of Pythias of the World were to be admitted in evidence, if desired by either parties, or such portions thereof as might be desired to be used by them, as shown by the stipulation on file in this case.

This includes the constitution and by-laws of the Endowment rank of the Knights of Pythias of the World adopted at the 17th session of the supreme lodge, held at Kansas City, Mo., August 23rd to September 3rd, 1892, inclusive; also the revised general laws
29 adopted by the board of control, October 22nd, 1892, and amended at subsequent quarterly sessions (revised edition, March 1st, 1894).

And also the constitution of the Endowment rank of the Knights of Pythias, adopted at the 17th session of the supreme lodge held at Kansas City, Mo., August 23rd to September 3rd, 1892, and amended by the supreme lodge at the 18th and 19th conventions held, respectively, in the city of Washington, D. C., August 28th to September 7th, 1894, and in the city of Cleveland, Ohio, August 25th to September 23rd, 1896; also general laws, rules, and regulations adopted by the supreme lodge, August 23rd to September 3rd, 1896.

The particular portions introduced by the defendant, and read to the jury, were the following: "If the death of any member of the Endowment rank heretofore admitted into the first, second, third, *or* fourth classes, or hereafter admitted, shall result from self-destruction, either voluntarily or involuntarily, whether such member shall be sane or insane at the time, if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then in such case the certificate issued to such member, and all claims against said Endowment rank on account of such membership, shall be forfeited." (Revised edition, March 1st, 1894.)

"If the death of any member of the Endowment rank heretofore admitted into the first, second, third, *or* fourth classes, or here-
30 after admitted, shall result from suicide, either voluntarily or involuntarily, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then the amount to be paid upon such member's certificate shall be a sum only in proportion to the whole amount as the matured life expectancy is to the entire expectancy at the date of admission to the Endowment rank; the expectation of life based upon the American experience table of mortality in force

at the time of such death to govern." (General laws, rules, and regulations, 1896.)

The tender of $138.00 was made to Mrs. Beck in this way: after the proofs of the death were made and was sent in regularly under the by-laws, I received from the board of control a warrant for $138.00, with instructions to deliver it to the beneficiary, and upon her acceptance or her surrender to turn the warrant over to her, and to return the certificate to the board of control. She refused to accept the $138.00, and I notified the board of control of that fact.

Q. I will ask you to read the section from the by-laws which shows your authority.

A. "Article X, section 3. The secretary shall receive all applications for membership made out in proper form, and forward them, accompanied by the membership fee, first monthly payment and dues, to the board of control. If notified of the rejection of
31 an applicant, he shall promptly return to him all moneys paid." The secretary of the local section is the agent for the board of control.

Q. I will ask you if you have ever seen these papers before?

(Witness is shown papers marked Exhibits "C," "D," and "E.")

A. Yes.

Q. I will ask you what these papers consist of.

A. The papers consist of the proof of death, as filed in accordance with the laws of the board of control, together with a complete transcript of the coroner's jury verdict.

Q. By whom were these delivered to you?

A. Mr. Oscar Beck.

Q. What did you do with them?

A. I forwarded them to the board of control by mail.

By COUNSEL FOR DEFENDANT: We desire now to offer in evidence the proofs of death that were made on this claim.

(The papers referred to, Exhibits "C," "D," and "E," were admitted in evidence, and read to the jury, and are as follows:)

EXHIBIT "C" (DEFENDANT'S).

Endowment rank, Knights of Pythias.

Certificate and Claim of Beneficiaries.

(All answers must be full and explicit.)

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

32 The undersigned, beneficiary of certificate No. 52169, for $3,000.00, insured by Endowment rank Knights of Pythias, to the late Frank E. Beck, a member of section No. 1258 of said Endowment rank, being duly sworn, says that she is the *bona fide* beneficiary

of the endowment accruing under said certificate, and declares that the answers given to the following questions are correct:

1. State the name in full, age, relationship, and residence of each beneficiary: Lillian H. Beck; 26 years; wife of deceased; residence, Helena, Montana.

2. Name of deceased in full: Frank E. Beck.

3. Residence of deceased since above certificate was issued: Helena, Lewis and Clarke county, Montana. In stating occupation, merchant, clerk, and similar terms must not be used.

4. (A) Occupation of deceased at the date of certificate: (A) Operating steam laundry. (B) Occupation of deceased March 1st, 1894: (B) Same as above. (C) Occupation of deceased from March 1st, 1894, to date of death: (C) Same as above. (D) Occupation of deceased since certificate was issued: (D) Same as above.

5. Place and date of birth of deceased: Detroit, Michigan, February 7th, 1860.

6. Place and date of death: Helena, Montana, October 31st, 1896.

7. (A) What was the disease during last illness? (A) Insanity. (B) What was the immediate cause of death. (B) Personal violence.

8. When did health of deceased first begin to be affected? Health was not impaired.

33 9. Duration of last illness? Give full particulars in relation thereto: Details given in evidence attached hereto.

10. Had the deceased any previous disease, and if so when and what was the nature and duration of the same? None other than insanity known to affiant.

11. Give the date as near as possible when health of deceased first became impaired? Particulars appear in testimony.

12. Name and residence of every physician who attended or prescribed for the deceased within three years prior to the date of death: Dr. William Treacy, Helena, Montana.

13. Was an inquest held? If so, furnish herewith copies of the evidence and finding: Yes; evidence attached.

14. Was death caused by suicide or violence or from other than natural causes? Suicide.

15. Was deceased engaged in any way in the sale or manufacture of alcoholic liquors? No.

16. Had deceased any other insurance on his life? If so, state what companies or societies, and the amount and date when each was obtained: Yes. Head camp of Woodmen, June 18th, 1892, $3,000.00; order of Maccabees, January 13th, 1892, $3,000; A. O. U. W. Workmen, November 30th, 1891, $2,000.

17. Have any of deceased relatives been afflicted with or died of insanity, tuberculosis, consumption, or any hereditary disease? State fully: No.

34 18. Have you known of, heard of, deceased applying for insurance to any company or association upon which a policy or certificate was not issued? If so, when and what company or association? No.

(Signature of beneficiaries:) LILLIAN H. BECK.

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Subscribed and sworn to before me this 11th day of November, 1896.

[SEAL.] CARL RASCH,
Notary Public in and for Lewis and Clarke County, State of Montana.

(Certificate of Jess C. Rickards that Carl Rasch was duly authorized to administer oaths, November 11th, 1896. Also certificate of L. Rotwitt that Carl Rasch was duly commissioned and qualified to administer oaths, dated Nov. 11, 1896.)

Certificate of Master of Finance.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

Walter F. Zeitz, being duly sworn, says that he is the master of finance of Ivy lodge No. 24, located at Helena, grand domain of Montana, and that Bro. Frank E. Beck of said lodge, who died on Oct. 31st, 1896, was at the time of his death in good standing, and that his dues were paid to Jan. 1st, 1896.

WALTER F. ZEITZ.

Subscribed and sworn to before me this 13th day of November, 1896.

ALBERT I. LOEB,
Notary Public in and for Lewis and Clarke County, State of Montana.

35 *Certificate of President and Secretary of Section.*

This is to certify that Frank E. Beck, who died on Oct. 31, 1896, was at the time of his death a member in good standing of section No. 1258, Endowment rank, Knights of Pythias; that he held certificate No. 52169 for $3,000, and that the beneficiary named therein is the same person who subscribed to the "certificate and claim of beneficiaries" on reverse thereof.

Witness our hands and the seal of the section at Helena, State of Montana, this 13th day of November, 1896.

JOHN L. KOONTZ, *President.*
W. C. RIDDLE, *Secretary.*

(Endorsed:) Suicide claim. Certificates of beneficiary, master of finance, and section officers. Death No. 3518. Certificate No. 52169. $3,000.00. Section No. 1258, Helena, Montana. Age, 35. Admitted April 5, 1895. Date of death, Oct. 31, 1896. Date paid, Nov. 24th, 1896. Warrant No. 3822. $138.00. To whom paid, Lillian H. Beck, widow.

EXHIBIT "D" (DEFENDANTS).

HELENA, MONTANA, *Nov. 1st*, 1896.

In re Inquisition upon Body of FRANK E. BECK, Deceased.

Mrs. F. E. BECK, being sworn, says: I am the wife of Frank E. Beck, deceased. He has threatened to take my life several times during the past three years. I have been married to him six years in December next. He was always drunk on each occasion when he threatened my life. He has been drinking heavily during the past 2 years. I have had to come out at night frequently
36 during that time to get Dr. Treacy to quiet him down. He came home in the afternoon of Wednesday last, and slept till about six o'clock. I called him for supper; he got up and ate his supper. Immediately after eating he went downtown. He returned home some time before 12 o'clock and was quite drunk. He commenced to sharpen a carving knife and was doing so for about an hour. He came into my room, grasped me around the left wrist, and held it up so (illustrating) for about two hours, and wanted to get the baby into the other room. The baby was lying on my left shoulder. She would not go. He stood there until he got tired, and went off into the other room and went to bed. He made no threats at that time. He slammed the door of his room and hid the knife. The servant girl had to hunt for it quite a while next day. He got up in the morning and went off before I saw him. At noon Wednesday we were going up towards home and on the way said: "Now, Frank, you have got to stop your drinking or I will not live with you." He replied, "You have got to, or will kill you." I then replied, "I will not go to the house with you; we will go back to the office," which I did, and he came along with me. I left the office while he went in the back part; I tried to avoid him, but he watched me and followed me home. He went out a while walking around, and I put on my things and went out. I remained away 2 hours. The girl said he came right back. I left my home Thursday and did not intend to stay away. As I came home, I saw some one who looked like him, so I avoided him. He was staggering drunk, so I went up Dearborn avenue and met my girl.
37 She says, "Mrs. Beck, do not go home; he's got the gun, and will kill you." I went to Mrs. Stedman's and remained until Saturday afternoon. I left then because he found out where I was, and I was afraid to stay there any longer. I went to Mrs. Nolan's after I left Mrs. Stedman's. He sent the girl over to Mrs. Stedman's, and told her to get the baby, and to ask where I was. He was told I had gone in a hack somewhere. He got a gun somewhere when told I had gone; said, "Well, I will go hunting." He came to Mrs. Nolan's about six p. m. and tried to get into the kitchen door. Failing to get in he tried the front door and commenced to bang at the door, but I did not speak at all. We (Mrs. Nolan and I) went upstairs and looked out the bath-room window, and we could see quite well. He had a gun in his hand. Soon after he went up towards

the boulevard, carrying the gun with him. He was gone perhaps an hour and he returned, but I could — say whether he was alone or not. There was some one who knocked at the front door and asked if Mr Rasch was there. I thought it was Mr. Beck's voice disguised. Mrs. Nolan answered, "No." He then said, "Oh, please let me in; Mr. Votaw is here with me." Mrs. Nolan said, "We have all gone to bed; come around in the morning." Then he got mad and said, "I won't." He then commenced to swear and kick at the door and call for Mrs. Beck. Mr. Reece was notified of the disturbance when he first came, so that he could telephone down for assistance. He (Mr. Beck) went from the front door to the side window in the dining-room and broke in the window, and
38 was about entering the house when the police officer came.
Soon after this we heard the shot fired which killed him. He had gone in the outside water-closet and had shot himself in the head. I did not see him after he had killed himself.

(Signed) LILLIAN H. BECK.

Mrs. C. B. NOLAN, being sworn, says: I went over to Mr. Reece's and told him what Mr. Beck had been doing; that he had threatened Mrs. Beck's life the day before, and asked him in the event he heard me call from the window for help he would come over and help me get him away. I called out of the window to him at the time he (Beck) was beating at the door the last time. Mr. Reece answered me, saying, "Remain indoors and keep quiet; it will be all right." At the time of the second pounding he (Beck) went off towards Esler's, and I presume he went after the gun which he took away on first leaving the house. He returned and crashed in the window at about the time the policeman arrived. After the crash I heard nothing more from Mr. Beck until the shot was fired. I heard the cab driver say to the policeman that some one went around towards the barn, and that he thought it was Mr. Beck. Soon after the shot was fired.

(Signed) HATTIE S. NOLAN.

W. H. MCCANN, the city marshal, being sworn, says: The first intimation I had of any trouble was a telephone message about 8 o'clock, saying Mr. Beck was over there (referring to Nolan's residence), trying to kick in the door. He asked to have a police officer sent over. I sent Officer Lynch over in a hack. He went
39 over as fast as possible. I did not go over until later, when I had a message that Beck had killed himself. I did not know that any trouble existed between Beck and his wife.

(Signed) W. H. MCCANN.

SAMUEL A. LYNCH, being sworn, says: I was told by Sergeant of Police Callahan to go over to Col. Nolan's house last night about 8 o'clock; that Frank Beck was breaking the windows over there and trying to get his wife out. Just as I arrived at the house I heard some one smashing a window. I could not see who did it. I had gone into the house and was searching lower floor. Mrs. Nolan was

inside, and I asked her if Beck was in the house. She said she did not know. I started to go outside, when Tom Reece came in and said the hackman had heard some one going around the house, and that he thought it might be Frank Beck. It was very dark around there. Just immediately following Tom Reece's statement I heard the shot fired around behind the house. I then went around to where the sound came from. I had a lantern in my hand. When I got within about 20 yards of the water-closet (this was before the shot was fired) I saw the flash of the gun, and saw a man fall back into the water-closet. He lived about 20 minutes after shooting himself. I stayed right there until he died; the gun lay along his body between his legs. His breathing was hard and difficult.

(Signed) SAMUEL S. LYNCH.

FRANK L. REECE, being sworn, says: I live next to Mr. C. B. Nolan. It was about 6.30 or 7 o'clock last evening when I
40 was appealed to by Mrs. Nolan for assistance. Mr. F. E. Beck was creating a disturbance, by threatening to kill Mrs. Beck with a shotgun, and asked me to go over. I went right over without delay. I saw Mr. Beck and Mr. Votaw together at the corner of Mrs. Nolan's yard. I moved along slowly. I heard Beck pounding at the front door. Beck make the remark to Votaw that if she did not come out he would kill her. I went to Mr. Esler's house to telephone for a policeman, but not finding a telephone there I went on to Mr. Cory's house. I sent my message from there to the city marshal. I informed the marshal that Mr. Beck was around Mrs. Nolan's house with a shotgun; that he had threatened to kill Mrs. Beck, and requested him to send an officer over there immediately. I returned home and went around Mr. Nolan's house, but did not see either Beck or Votaw. I then procured a lantern and went back to my house and got my revolver, and thought I would search the yard and buildings for Beck. As I was nearing Mr. Nolan's gate I heard the breaking of a window, and Mrs. Nolan ran out the front door shouting that Beck was trying to get into the house through the window. Police Officer Lynch arrived just as I was going into the gate. We both entered the house together, expecting to find Beck in one of the rooms, and Mr. Gordon, the hack driver, ran after us and stated that he saw Beck in the back yard. We ran out the kitchen door. Just as we did so Beck fired the fatal shot.

(Signed) FRANK L. REECE.

W. S. VOTAW, first being sworn, says: I am a partner of
41 Mr. Beck's in the steam-laundry business. Up to three months ago, during the past 2 years, Beck was drinking very heavily. Since then, up to a few days ago, he was drunk very little. It was about four days ago when he commenced to drink again. I have tried several times to stop him. Mrs. Stedman said I should do something to stop him from drinking. I could not say whether Mrs. Beck has said anything about his drinking or not. He was not at the laundry all day Saturday, at least while I was there. It was about 7.30 last evening, in front of Paine's hotel, when

I met Beck. He seemed to be all right, and I did not notice anything out of the way at all. I said to him: "I was just going up to see you, Frank." He had telephoned down to the laundry in the afternoon, and asked if I was there, and that he wanted to see me. It was late, and I waited until after supper. I told the driver of the delivery wagon to stop and tell Beck I would be up after supper. While I was gone to supper the Becks' hired girl came down to say that Mr. Beck had said he was going to get a gun and go hunting. He (Beck) said to me when we met on Park avenue, "Billy, I hate to bother you with all these troubles," and I said, "Never mind, Frank; if there is anything I can do for you let me know." He says, "I want you to go to Nolan's and tell Mrs. Beck I want her and the little girl to come home right away." I says, "They live in the Edgar house, don't they?" and he replied, "Yes; I will go along with you," and while going along down to Nolan's he had very little to say. I said to him, "Whatever you do, don't do anything rash; there are other ways of settling this difficulty without doing
42 any one any harm." He said he wanted them to come home. When we got there on the porch he rattled on the door and Mrs. Nolan said, "Who is there?" He said to me, "Answer her." I then said, "Is Mr. Rasch here?" She replied "No." Frank Beck says, "Hattie (Mrs. Nolan), let me in." She says, "The folks have all gone to bed; come back in the morning." That seemed to make him mad and he commenced to hammer on the door, and I said to him, "Don't do that, Frank. Come away." I became excited then, and I thought of running for help. I ran up to the corner and thought to call for help. The noises had ceased then and I went around the next corner of the adjoining block, and I thought he was following me. Not seeing him, I went back as far as the vacant lot where I could see and hear everything for a space of about ten minutes. Not hearing anything I went to where my engagement called me, and when I got there it was about eight o'clock. I came downtown about nine o'clock, and the first man I met was Mr. John T. Laws, who asked, "Have you heard that Mr. Beck had committed suicide," and I went on to Main street and there I met City Marshal McCann, who said, "Dr. Pleasants, the coroner, and Mrs. Beck want to see you." To go back a little, while Beck was at Nolan's front door trying to get in, he said unless his wife let him it, he would kill her. He seemed very much excited while he was pounding on the door. When he was drinking he was usually foolish, but he did not appear to be vicious at all, or show any inclination to be mean or ugly. When sober, he seemed, I think, to be fond of his family and kind towards them. He had more or less to say
43 to me about his family worries, and he seemed particularly annoyed because his wife did not desire to increase the size of her family. If I had known that he intended to make mischief or had taken a gun down there, I would never have allowed him to have gone back down there.

(Signed) W. S. VOTAW.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

In the Matter of the Inquisition upon the Body of FRANK E. BECK, Deceased.

An inquisition holden at Helena, in the county of Lewis and Clarke, on the first day of November, A. D. 1896, before me, Thomas H. Pleasants, coroner of said county, upon the body of Frank E. Beck, there lying dead, by the jurors, whose names are hereunto subscribed, said jurors upon their oaths do say that Frank E. Beck came to his death on the 31st of October, 1896, by shooting himself in the head with a double-barrel shotgun, with the purpose and intent of committing suicide, while temporarily insane, due probably to the use of intoxicants. That the shooting was done in the outside water-closet of the premises now occupied by the family of C. B. Nolan, and that he threatened to kill his wife before killing himself.

In testimony whereof the jurors have set their hands the day and year aforesaid.

(Signed) R. H. BECKWITH.
(Signed) LOUIS J. ISRAEL.
(Signed) C. A. CAHILL.
(Signed) A. H. LYNN.
(Signed) J. S. ALLING, JR.
(Signed) A. B. COOKE.

Attest: THOMAS H. PLEASANTS, *Coroner.*

44 I, Thomas H. Pleasants, coroner of Lewis and Clarke County, State of Montana, do hereby certify that the testimony contained in the foregoing ten pages of legal cap attached herewith is a true copy of the original testimony taken at the inquest upon the body of Frank E. Beck, deceased, on November 1st, 1896, and that the above verdict is a true copy of the verdict rendered by the jury in accordance with said testimony.

T. H. PLEASANTS,
Coroner of Lewis and Clarke County, State of Montana.

HELENA, MONTANA, *Nov. 14th*, 1896.

I hereby certify that Thomas H. Pleasants is the coroner of Lewis and Clarke county, State of Montana, and that the signature attached to the foregoing certificate is his signature.

[SEAL OF COURT.] JESS C. RICKER,
Clerk of First Judicial District, State of Montana,
By GEO. E. BAYHA,
Dep. Clerk said Court.

EXHIBIT "E" (DEFENDANT'S).

Certificate of Physician and Undertaker.

Proof of death.

Frank E. Beck, section 1258. Helena, Mont. Date of death, October 31st, 1896. Cause of death, bullet wounds. Suicide (alcoholism.)

Approved Nov. 19, 1896.

T. J. A. H., M. D.

(The above paper, Exhibit "E" (Defendant), is a printed blank, not filled out.

45 Continuation of direct examination by W. C. RIDDLE:

Mr. Oscar Beck gave me those papers, and as secretary I forwarded them to the board of control. Saw the body of Frank E. Beck at Mr. Flaherty's undertaking rooms after his death; my attention was called to the fact that there was a mark on the forehead, where the wound was fixed up by the undertaker; that showed too; there seemed to be a mark there; it seemed to be a round mark or a ring, as though you had laid it on a thimble, or some old tube; it left a mark there; it was called to my attention by some of the men there. It was about the size of a No. 12 gun barrel—ten or twelve.

Cross-examination.

By C. B. NOLAN, Esq., of counsel for the plaintiff:

I knew Mr. Beck and was a member of the same lodge. I presented the application to Mr. Beck that has been read in evidence here; didn't read it to him. Don't remember how long he retained it. Don't remember whether there was any discussion about the application or not. I think he brought it back to me the day after I give it to him; always keep a supply of them on hand. He had a copy of the by-laws, but whether I gave them to him or not, I don't remember. I probably furnished the blanks of the proof of death two or three weeks after Mr. Beck's death. I don't remember exactly who I gave the blanks to. I don't know whether a copy of the by-laws was in the possession of Mrs. Beck at the time she presented the proofs of death or not. I gave no personal instructions about filling out the blanks. I couldn't state how long the blanks were in
46 the possession of Mrs. Beck. I don't know whether Mrs. Beck was present during all the time that the testimony was being taken at the coroner's inquest or not. I saw Beck's body the day after—Sunday afternoon, I believe it was. My attention was called to the mark on the face by some one in the room; there was several there. I just looked at it and passed on. Don't remember who called my attention to it; don't recollect who they all were in the room. I wasn't looking at the corpse at the time; I turned around then; it was before the corpse was put into the coffin. The mark was

imply a round ring; it was a little like a bruise or something like hat, black or blue, or whatever color you would call it. My attention was first called to it while the corpse was there; the next time by Mr. Loeb, two or three months ago. I didn't pay much attention to the matter, Colonel. The mark was circular in form. I have seen the barrel of a gun. I couldn't say exactly how much surface the mark extended over. I said it was such a mark as might have been made by a ten or twelve gun. I wouldn't say that the skin stuck out a little. It was a little over one eye, which one I couldn't say; right along here (designating a portion of the forehead a little to the left of and above the eye, about the edge of the eyebrow). I couldn't tell, as a matter of fact, that a portion of the forehead had been blown away from the inspection that I made of it.

Redirect examination:

I don't know whether these American experience tables of mortality are used by all life insurance companies or not; they are
47 the ones that are called to our attention by the Endowment rank. They are published in the by-laws.

Q. How is the amount due under a policy of this kind figured, Mr. Riddle?

By the COURT: Do you know how this is figured?

A. Yes, sir.

By the COURT: Tell the jury, then, how it is figured.

A. The expectancy of life at a given—take in the case of Mr. Beck; he was 34 years old, and the expectancy of life, according to this statement, would be 32½ years, which he should have lived, and under the law you would divide three thousand by 32½, giving the amount for one year, and then add a fraction of a year, whatever the fraction is, and you will get it down to fractions.

By Mr. LOEB:

Q. And this amount of $138.00 was tendered to her as the amount due under that process of figuring?

A. It was sent to me by the board of control as the amount due under that system. I never figured it because I supposed they had figured it.

C. B. NOLAN, Esq., counsel for plaintiff, being duly sworn, testified on behalf of defendant as follows:

By Mr. LOEB:

(Counsel hands witness Defendant's Exhibit "C.")

WITNESS: That is my handwriting; that is a portion of it.

Q. Yes, this portion here from where the questions are begun to be answered to the signature of Lillian H. Beck?

A. Yes, that is my writing from "Lillian Beck" down to "No."

48 Q. "No" to question 18?

A. Yes, sir; that is right.

E. L. FLAHERTY, a witness on behalf of defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. LOEB:

My name is E. L. Flaherty; reside at Helena, Montana; am an undertaker, embalmer and funeral director, and have been for the past sixteen years; have handled a great many bodies during that time. I had charge of the Beck funeral; prepared the body of Frank E. Beck for burial. The body had about two-thirds of the top of the head blown off and the skull gone; perhaps a tablespoonful of brains in the cavity. I noticed that there was a mark under the left eye, a half semicircle, extending across the bridge of the nose up in here (indicating) to the forehead between the eyebrows. The skull was blown from the scalp. There were no powder marks on the face. I have prepared suicides for burial. I have handled cases where men have killed themselves with revolvers. When a gun is held close to the skin and fired, it will not leave powder marks; holding it from six inches to two feet will leave powder marks; and if there is clothing on the body when held close, it will set them on fire. In my opinion the death of Frank E. Beck was caused by a gunshot wound; in my opinion, judging from the marks upon the body of Mr. Beck, and the absence of powder marks, the gun was pressed against the body at the time it was discharged; the cause of this circular mark that I have men-
49 tioned upon the face of Mr. Beck, in my opinion, was the impression of a gun barrel; a shotgun pressed against Mr. Beck's face would produce a mark like that. (Gun is produced by attorney for defendant and witness requested to illustrate to the jury how the mark could have been made.) If you had a gun set on the ground with a man holding his face on the barrel like this (witness illustrates), it would leave a mark as I have described, and in my opinion, from handling and preparing bodies for burial during the last sixteen years, the case of Beck presented one of the plainest cases of suicide I ever buried, from the mark which I observed under the eye and from the theory which I have as to the manner in which the gun was used; that is to say, the stock of the gun was placed upon the ground and Mr. Beck pressed forward, pressing his eye against the barrel of the gun, making the mark I have already referred to, and stooping down and discharging the gun. I was not present when the gun was discharged, and from actual knowledge or observation cannot tell whether it was a case of suicide or not. I only say that it was suicide from the mark under the eye, the circumstances of the case, and the absence of powder marks, which in my judgment was caused by the barrel of the gun, and this mark could only be made by placing the stock of the gun on the ground and pressing the head against the barrel. Pressing the gun against the face would make a mark like that; if not pressed there would be no such mark. The presence of this mark and the absence of powder marks on the face indicate that the gun was held close to the skin.

50 Cross-examination.

By C. B. NOLAN, counsel for plaintiff:

I am a member of the Endowment rank of the Knights of Pythias; I first noticed the marks I have described on the 31st day of October, at 10 o'clock at night; that was before the body was removed to my establishment. I did not make any examination for the purpose of ascertaining the extent of the injury at that time. I helped to lift the body from the place where it fell about nine-thirty that night. Death occurred instantaneously. I don't know when the shot was fired. Marshal McCann first told me of the matter. He called at my place of business and told me Mr. Beck had killed himself. I didn't see any gun around when I got there; I took the body to my undertaking rooms and started to wash it; that is when I discovered the mark under the eye. (Witness describes wounds on the head.) The mark under the left eye was a red, semicircular mark. It was depressed very slightly; very little flesh over the bone; the mark was quite noticeable; could be easily seen by anybody just as well as by myself. I should judge the length of the mark would be about like that (witness indicates). Part of the eyelashes were left; the lower eyelid was intact. You see the barrel probably ran from one finger to the other. (Witness indicates.) It would be in this shape. My theory is that it was pressed against the face when it was discharged (the gun).

Q. Are you prepared to say that this mark was not occasioned by the pressure of the skin upon this bone?

A. I am prepared to say that the mark was caused by the
51 pressure upon the skin of a barrel of a gun. It could be caused by something else than the muzzle of a gun. My theory is that the gun was put on the ground like that—just like that (witness indicating by placing the stock of the gun on the floor, and pressed against his left eye), and then the trigger was touched, and the gun went off.

Q. You saw it done?

A. Well, my arm isn't long enough, but I could do it with a pencil.

Q. And if you were there, it would be necessary for you to use a pencil or a stick of wood or something to get the gun to go off?

A. Yes, sir. I don't know how my arms compare with Mr. Beck's arms. If his arms were the same length as mine, it would be necessary for him to send the gun off with a pencil or a stick of wood with the gun in this position (witness indicates by placing gun to his face). I don't know whether there was a pencil or a ramrod or a stick of wood there; I didn't see any; there wasn't any string on his foot. I don't pretend to say how it was done at all; I am just saying my opinion; I don't pretend to say whether it was done by a stick, pencil, string, or what. There were no powder marks on him.

Redirect examination:

The body was lying partly in the water-closet and partly on the

ground. There would not be a ring like that on his face if something had not come in contact with it.

Recross-examination:

He was not on the seat of the water-closet. I have no idea
52 whether he held the gun this way (illustrating) and pulled it off, or whether he was sitting down. The lower part of the eye was intact.

Mr. FLAHERTY was recalled for further cross-examination by Mr. Nolan after the defendant had rested, and testified further as follows:

By C. B. NOLAN, Esq.:

I am aware, of course, that suicide would mean the intentional act; that my theorizing would place him directing that gun towards himself, pulling the trigger. I don't pretend to say that that mark could not be occasioned in any other way than placing his head upon it. I would require some little time to get the gun down in the manner I gave you to understand it was placed this morning; it would take some little time for him to get his face in shape, and to get the gun down and a pencil or a stick to get the gun off, if his arm wouldn't reach. And if the evidence showed in this case that the man having the gun stepped from a water-closet on to a walk, and the gun was accidentally discharged by coming into contact with the walk, it of course is possible that the death of Beck might have occurred by his falling on the gun if the gun were discharged simultaneously with his head striking the barrel, and under the circumstances that might occasion the mark there; I gave you to understand that the gun was resting against the eye this morning; I gave you my theory; but stepping down and falling on the gun would make a mark like that. If he was stepping down he couldn't have pulled the gun in that way. There might be powder marks if a man was away from the gun when it was discharged.

53 J. S. ALLING, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By A. I. LOEB, Esq.:

My name is J. S. Alling; am city editor of the Helena "Herald;" on the night of the 31st of October, 1896, I was one of the members of the coroner's jury that sat upon the body of Frank E. Beck. I saw the body of Frank E. Beck. I noticed marks that had been made by the undertaker in sewing up a wound in his skull; I think there was another mark under the eye, the left eye; it was a sort of a black, reddish bruise—a square mark under the eye.

Cross-examination:

It was a sort of a black, reddish bruise. I think there was a slight abrasion of the skin where this wound was. I believe one of the

jurors called my attention to it; there was quite a distance—half an inch—between the mark and the eye; I couldn't say as to the exact location of the mark; I don't think there was any other disfigurement of the skin there. I don't think there were any powder marks. I knew Mr. Beck in his lifetime; I should think it was much darker under his eye when I saw the body than in his lifetime.

HILDA CARLSON, a witness on behalf of defendant, being duly sworn, testified as follows:

Direct examination:

54 My name is Hilda Carlson; am working for Mrs. Moses Morris. In years 1894 and 1895 I was working for Mrs. Beck. I knew Frank E. Beck in his lifetime. Sometimes their family relations were pleasant and sometimes they were not. Mrs. Beck treated Mr. Beck nice when he was sober, but when he was drunk she didn't always treat him nice. I never heard Mr. Beck say anything about committing suicide. I remember Mr. Beck getting a gun and taking it into an adjoining room from where Mrs. Beck was, and firing a shot and calling to her that he had committed suicide. I don't remember exactly what Mrs. Beck said on that occasion. I believe that she said he didn't have sense enough to do it. I remember one time when I was sitting at the table and he was playing with the baby, and he took the carving knife and drew it across his throat and asked her if he should cut it, and the baby screamed and then he took the knife away. I remember of calling Mr. Beck's attention to the fact that he was drinking heavily, and he says, "A man that has as much trouble as he had, the sooner the end came the better." I remember an instance at Elliston when Mrs. Beck, Mr. Beck, the baby, and Mrs. Spalding and myself were present. They were disputing about one thing and another and Mrs. Beck threw a knife at Mr. Beck; the knife went into the next room, and stuck in the wood in the wall. Mr. Beck came home drunk quite frequently while I was there. I asked Mr. Beck one time why he didn't quit drinking. Mr. Beck made the remark one time that a man that had as much trouble as he had would be better off dead than living.

55 Cross-examination:

He said that a man that had as much trouble as he did would be better off dead than living. I was in Beck's employ two or three years; commenced some time in 1894. I quit there three years next July. I believe I was in their employ part of 1893, in 1894 and up to July, 1895. I have given you all the evidence of unpleasantness that came to my knowledge during the time I was there. I had this conversation with Mr. Beck four or five months before July, 1895, I should think; he wasn't in liquor at the time; he wasn't drunk at that time; he was drunk perhaps a day or two before that. I don't remember exactly when he was drunk before that. Some-

times he drank and sometimes he didn't. I don't remember how often he would get drunk. He would remain drunk a day and sometimes two. Three months, to my recollection, is the longest period he went without being drunk." At the time I refer to, I asked him why he was drinking, and his reply was as I have stated. Things were not pleasant in the family when he was drunk. Things were more pleasant when he was sober. They seemed to be attached to each other. I did not talk to anybody about my evidence in this case. I know Mr. Walters; I met him at a party. I know that Mr. Walters is a detective now. He only asked me if I knew anything about Mr. Beck, and I said I did; that is all * * * This pistol episode took place in 1894, the last part of the summer, if I remember right. He said, "Oh, Lelah, I have killed myself." I couldn't say whether he tried to shoot himself or not. I just heard
56 the revolver go off. I don't know that he fired through an open window; I was in the kitchen at the time he said this; he was in the bath-room at the time he shot; there is just a thin board between the bath-room and the kitchen; Mrs. Beck was in her bed-room at the time; I didn't see any blood around; there was no quarrel at that time so far as I know; he hadn't been drinking then that I know of. At the time of the Elliston episode, I don't know what it was about; they didn't call each other names; they were sitting at the table all the time; Mrs. Beck took up a silver knife; Mr. Beck was across the table. Mr. Beck wouldn't keep still and so she did this.

Redirect examination:

I did not know Mr. Walters was a detective at the time I met him at this party. I remember the pistol episode because I got frightened.

Q. Do you ever remember of Mrs. Beck denying Beck the right to see the child?

A. Yes, I do. I couldn't say how frequently that occurred. Mr. Beck didn't seem to like that at all.

Recross-examination:

Q. Do you know whether he was drinking or not at the time he was denied admission to the little girl?

A. Well, sometimes he was and sometimes he was not. When he was drunk sometimes he made trouble around the house, and was pretty rough; he would take hold of Mrs. Beck and hold her sometimes, that is all.

J. A. DOUGHTY, a witness called on behalf of the defendant, being duly sworn, testified as follows:

57 Direct examination:

My name is J. A. Doughty; my place of business is Electric Light building in this city; I am in the furniture business and deal in furnishing goods. I knew Frank E. Beck in his lifetime. I have

guns and ammunition and other things in stock, and have guns for renting purposes. Mr. Beck, prior to October 31st, 1896, came to my office for the purpose of borrowing a gun. I wasn't in the store at the time; but a slip of paper was on the spindle showing—I have not looked for that slip of paper; they are always destroyed at night. The slips usually contained the name of the borrower of a gun. This slip of paper stated that Mr. Beck had borrowed a gun. I charged the gun up to the borrower, and gave him credit for it when it was brought back. I was present when the gun Mr. Beck borrowed was returned; I believe it was returned by Mr. Beck, the brother, or Mr. Votaw; the gun was brought back in my presence.

Q. What character of guns do you carry in stock there?

I object to the question for the reason that it is incompetent, irrelevant, and immaterial what kind of guns he kept.

By Mr. LOEB: I desire to offer to show by this witness that he had in his possession several lengths of guns; some are what is called the Belgium gun, some are long-barreled guns, and some are short-barreled guns, and so far as the recollection of this witness is concerned, he doesn't know whether it was a long or short barreled gun that was borrowed by Mr. Beck.

58 (Objection sustained by the court. To which ruling of the court in sustaining the objection of plaintiff's counsel to offer of the defendant's counsel to prove those facts, the defendant then and there duly excepted.)

FRANK L. REECE, a witness called on behalf of the defendant, after being first duly sworn, testified as follows:

Direct examination:

My name is Frank L. Reece; reside in Helena; am a land and a mining attorney. I was at home on the night of October 31st, 1896, and in the evening after supper Mrs. C. B. Nolan came to my house, and requested me to come over there; I went to her house, and met Mr. Frank E. Beck and Mr. Votaw, on this side of the house; they were the only persons I saw. Beck and Votaw went on to the front porch of the house, and some one commenced to kick at the door. Beck remarked, "Damn her, I'll kill her if she doesn't come out." As soon as I heard that, I went to Mr. Cory's and telephoned from there to the police station; I then ran back from Mr. Cory's house to my home, and Mrs. Nolan was calling for me, and I went back to Mrs. Nolan's house, thinking I should find Beck, but I could not; then I went back to my house and procured a lantern and went back to Mrs. Nolan's again, and just as I got to the front gate I heard glass breaking, and I went into the alleyway, and just about that time the hack got there with Mr. Sam. Lynch in it. We lighted the lantern and went through the kitchen up the back stairs; I stayed at the front door; then we heard Mr. Gordon, the hackman, say,

59 "He has gone through the front yard," and just as we got to the kitchen door the shot was fired. We went to where Mr. Beck's body was as quick as we could; I saw Mr. Beck lying there with a shot-

gun, with part of his head blown off. I saw Mr. Beck was dead and I went into Mr. Nolan's house; and then I went to Mr. Cory's again and telephoned to the police and the coroner. He had gone into the water-closet evidently, and he had turned to go out, and his body was lying with his head almost against the closet itself—up in the corner like. His feet were out over the step; his head was lying in the corner of the closet; I think the gun was lying outside the closet on the ground; he evidently stood outside the closet when the shot was fired, and he fell back into the closet; I picked the gun up myself; I examined it. There was one hammer up; it was a breech-loader, and I found one load in the gun. I think it was the right-hand barrel that was discharged; I am not positive about that, though. I didn't pay very much attention to the gun; I didn't see the shot fired; it was fired just as we went out of the door; Lynch was ahead of me just a few feet; I didn't see Beck fall over. I knew Frank E. Beck during his lifetime; I think he used to drink; couldn't tell whether he was under the influence of liquor that night or not; I don't think he was.

Q. What would you say immediately upon your arrival there; what were the indications as to the manner of the death of Frank E. Beck—indicating suicide or otherwise?

60 By COUNSEL FOR THE PLAINTIFF: We object to the question for the reason that it is incompetent, irrelevant, and immaterial.

By the COURT: Objection sustained.

(To which ruling of the court the defendant then and there duly excepted, and had his exception noted in the minutes of the court.)

Cross-examination:

I think that he had gone into the water-closet and turned out again; one of the hammers was up, and the other down; it was after I had been over and telephoned for the police that I heard the crash of the glass; I was just about the front door of your house then; Mrs. Nolan came out of the front door just as I got there. And just then the policeman came; he had no lantern with him; he took mine. I went as far as your dining-room and then the window began to crash and I backed out into the hallway; Mr. Lynch went up the back stairs and I followed him; we were laboring under the impression that Beck was in the house. It seems to me that Lynch was just about the head of the stairs when Gordon announced that he had gone around to the back of the house; I think Mr. Gordon was in the front yard then, when he heard Beck going around the back, and Lynch and I immediately went into the yard, and when we got to the door we heard the discharge of the gun; Mr. Beck's body was lying part way in the closet and partly out. He looked as if he fell back into the closet; he was lying a little obliquely, in a southwesterly direction. I don't remember which way the muzzle of the gun was pointed.

There wasn't any string around there. I didn't see any
61 pencil or stick or anything of that kind around there. I knew Mr. Beck for some years during his lifetime. I didn't

associate with Mr. Beck at all. There wasn't anything to suggest that he was drinking on the 31st of October, 1896. The kitchen door was about 50 feet from the water-closet where the body was found. It would be impossible to see that distance, the night was so dark. A plank walk leads from the kitchen to the water-closet, and a step leads from the walk to the floor of the water-closet. Mr. Lynch was immediately in front of me when the shot was fired.

Redirect examination:

I had a lantern with me that night; Lynch did not. I didn't make a careful search for a string or pencil; the only thing that I found was a piece of his skull. I wouldn't undertake to say whether there was a string or pencil or stick there or not.

GRANT GORDON, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Grant Gordon; I was a cabman on October 31st, 1896; I took Policeman Lynch to Mr. Nolan's house that night. I did not tell Mr. Lynch that I saw Mr. Beck running around the house that night; I told Mr. Lynch I heard some one going to the rear yard to the water-closet.

Cross-examination:

The night was very dark; you could not distinguish anybody twenty feet away. I went around the back part of the house
62 that night; I know where the kitchen door is, and also the closet, where the body was found. I told Mr. Lynch I heard a person going back to the closet, and I thought it was Mr. Beck. I could only just distinguish the outlines of a man's figure.

Miss HILDA BORG, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Hilda Borg; I worked for Mrs. Beck on October 31st, 1896. I work for Mrs. Luke at present—Mrs. John Luke's. Mr. Beck was at supper that night. Right after supper that night he said he wanted me to go and get the gun; he said he wanted the gun; that he was going hunting; I did not go and get the guns; I was afraid to; I was afraid he would shoot Mrs. Beck. Mrs Beck told me to hide the guns. They got along very well together when he wasn't drinking. On the 31st of October, I was at Mrs. Stedman's with Mrs. Beck; she sent me home, and I went there between nine and ten, and he was in bed then; he stayed in bed till about four o'clock and then went out. I didn't believe Mr. Beck was going hunting when he said he was. I remember seeing ink stains on the carpet there. Mr. Beck said the little girl threw an inkstand at him. Mr. Beck sent me to see Mrs. Beck in the evening; he said he wanted

me to go to get the little girl. I went over to Stedman's, and he says "I will go out hunting," and he took the gun. I have hidden guns in the Beck house. Mr. Beck came home one day awful
63 drunk and I took them upstairs, and Mrs. Beck told me to go and hide them, and I did. One of the guns was a long one, and one wasn't a very long one. I cannot describe them. He went down-town one day and got a gun, and the next day when I went upstairs it was gone. The other gun was gone.

Cross-examination:

There were two guns up there; there were three. He got the Doughty gun the day before he got killed. I couldn't tell how the Doughty gun compared with the other guns; I know one gun was shorter than the others. Mrs. Beck had a gun up there, a single-barreled gun. That was a short gun—no, I am not sure which one it was that was the short gun. I don't know which was the short gun. I know one gun was shorter that the others; I could not tell whether that was Mrs. Beck's gun.

Q. Do you know whether Mr. Doughty's gun, or the gun that was brought there the day of the night when Mr. Beck died, was taken by him that evening when he left there?

A. I didn't know he took the gun in the bath-room. I saw him go into the bath-room, and he came back with a gun and put on his coat and went.

Q. So when he went he took the gun that he had got at Doughty's?

A. Yes, I think it was.

Q. You didn't know that he had found either?

A. No.

Q. Well, as a matter of fact you tell us that he did have the others.

A. I found out afterwards.

64 Q. And you found out afterwards that it wasn't the Doughty gun that he took, but it was one of the others?

A. Yes; I don't know which gun he did take. I didn't know that I did say he took away the shorter gun; I didn't know as he asked me that; I don't know as a matter of fact that the gun he took was the shorter gun.

Q. You found out afterwards, didn't you, from the inspection that you yourself made of the guns that the gun that he took was not the gun that he borrowed that day?

A. Yes, that is what somebody said.

(Motion by Mr. Nolan, to strike out the testimony of the witness relative to the gun taken by Mr. Beck being the short gun, was sustained by the court.)

I put the guns in hiding upstairs. Mr. Beck brought a gun home the afternoon of the 31st, about four or five o'clock. I don't know where he put it. He asked me about the other guns; he told me he was going hunting; that was after he brought home this gun. He didn't say anything about the gun he borrowed; I don't — whether he had it in the bath-room or not. I labor under the im-

pression that he took the gun he brought in the afternoon away with him, but found out afterwards that he didn't, but that he had found the guns that I hid. Somebody said it was the gun that he shot himself with. I found just one gun in the place where I hid them, when I went to look for them; one gun was shorter than the other; I couldn't say how much; I didn't measure them. I don't know whether it was the shorter gun that was missing or not. I stayed up at the Beck house several days after the burial; I don't remember Mr. Oscar Beck
65 taking the Doughty gun back; I don't know anything about it. I don't know about the weight of the guns. I went to Beck's the 4th of June, and stayed until Mrs. Beck went East. I said that unless Mr. Beck was drunk, they got along affectionately. He seemed to love his little girl awfully well. I know Mr. Walters. He came to see me one evening; he asked me if I had been working for Mrs. Beck. He said he had heard a young man used to go up there. He didn't say anything about wanting me to testify to that. I said I know it isn't so; he didn't want to make me believe it was. He left this card. It was a short time before the trial here was going to come off. I said Mr. Beck came home that day about nine or ten o'clock; that Mrs. Beck had left the house and was staying over at Stedman's. I said Mrs. Beck sent me home about nine or ten o'clock; I said he was in bed when I went home; I don't know whether he was drunk or not; he got up about four in the afternoon; I couldn't tell whether he was sober or not. He wasn't staggering around there. He brought the gun home afterwards; then he went down after he got the gun; he didn't stay very long; he brought the gun in with him. It was a long gun that he brought in with him. I don't know whether it was longer than the guns I put upstairs or not. It was then he told me to get those guns, that he desired to clean them; I didn't get them. I knew he was ugly sometimes when he was drunk. I never heard him say he was going to kill Mrs. Beck. He seemed to be after Mrs. Beck. I thought maybe if he had a chance to kill Mrs. Beck, he would kill himself.

66 Redirect examination:

I don't know any gun called the "long gun." I know one of the guns is shorter than the other one. I don't know which gun was there the next day when I found it. I know it was Mrs. Beck's gun, but I didn't know whether it was the short one or not. Mrs. Beck's gun was there, and the other gun was missing. Mr. Walters asked me if I had been working for Mrs. Beck; he asked me if they got along, and he asked me about the young man; that is all. He left his card with me.

Recross-examination:

I know it was Mrs. Beck's gun there the next day.

Q. And it was the gun that didn't belong to Mr. Beck that was taken by him—by somebody?

A. Yes, sir.

W. S. VOTAW, a witness called on behalf of the defendant, after being first sworn, testified as follows:

Direct examination:

My name is W. S. Votaw. I live in Helena, Montana. I was in the steam-laundry business, a partner of Mr. Beck, the deceased, Oct. 31st, 1896. He drank considerably, but was not always drunk. I testified at the coroner's jury. I remember what I testified to at that time. He made a statement to me, either a day before or two days before he died. It was when Mrs. Beck was up at Stedman's. Mr. Beck sent me up as a kind of a peace-maker, to see if I couldn't get them to come back again. I asked him what was the
67 matter, and he stated, gave me to understand—it seems as though he desired an increase in the family and Mrs. Beck objected to that; that seemed to lead up to a quarrel and I presume that caused her to go away.

Cross-examination:

Mr. Beck simply drank occasionally; he wasn't drunk all the time; there would be quite a spell when he wouldn't drink; I think he had been sober for quite a while before he died; he seemed to desire to bring about a settlement between himself and his wife. He didn't tell me he was going to kill himself. He didn't say the objection on the part of his wife to an increase in the family was the cause of the rumpus; I just inferred that that was the cause. I went down to Col. Nolan's house with him; he seemed to be all right; he didn't seem to be under the influence of liquor; he seemed to be perfectly rational; seemed to be a little troubled—worried.

The witness Sam. Lynch being absent from the district of Montana, and it not being possible to take his deposition for use upon the trial of the case, it was stipulated and agreed between plaintiff and defendant that he would testify to the same state of facts upon the trial, if present, as he did before the coroner's jury, and that the testimony so given by him before the coroner's jury should be read in evidence on behalf of the defendant upon the trial.

The testimony above referred to is as follows:

"SAMUEL S. LYNCH, being sworn, says: I was told by Sergeant of Police Callahan to go over to Col. Nolan's house last night
68 about 8 o'clock. That Frank Beck was breaking the windows over there and trying to get his wife out. Just as I arrived at the house I heard some one smashing a window. I could not see who did it. I had gone into the house and was searching lower floor. Mrs. Nolan was inside and I asked her if Beck was in the house. She said she did not know. I started to go outside, when Tom Reece came in and said the hackman had heard some one going around the house, and that he thought it might be Frank Beck. It was very dark around there. Just immediately following Tom Reece's statement I heard the shot fired around behind the house. I then went around to where the sound came from. I had a lantern

n my hand. When I got within about 20 yards of the water-closet his was before the shot was fired) I saw the flash of the gun and saw man fall back into the water-closet. I stayed right there until he ied. He liv l about 20 minutes after shooting himself. The gun ay along his body between his legs. His breathing was hard and ifficult.

(Signed) SAMUEL S. LYNCH."

Defendant rests.

Evidence for Plaintiff.

GRANT GORDON, called on behalf of the plaintiff, testified as follows:

Direct examination.

By C. B. NOLAN, Esq., counsel for the plaintiff:

I went down to your house with a hack, taking Mr. Sam. Lynch with me; it was about eight or nine o'clock in the evening; it was very dark; stopped the hack right at the corner of the house. 69 We had a lantern, and the light did not reach the back portion of the house; there was no light in the house. Mr. Reece had the lantern; we did not have one with us; just an ordinary lantern, and didn't give a very bright light. I was in the front yard to the east side of the house; there is a lattice there; it was so dark that you could not see for a greater distance than fifteen or twenty feet. I heard some one's footsteps on the walk going towards the back of the house, but could not tell who it was; didn't hear any other noise than his footsteps; I didn't see the gun at all.

Cross-examination.

By Mr. LOEB:

I couldn't see any string or pencil or stick; didn't make any search for any. I could see it was the form of a man, but could not recognize the features. I saw him walking towards the closet, and saw him step into the closet. When I saw that I went around and informed Mr. Reece and Mr. Lynch what I had seen. I did not go to the water-closet until after the shot was fired. I was not between the lattice fence and the closet. I was between the lattice fence and the street; the lattice fence was between me and the water-closet; I saw the fire from the gun. After he walked around to the closet he stood there perfectly still; then he seemed to step out of the water-closet; I heard him, and the gun was then discharged. I didn't see the image of a man fall. I could not because of the lattice fence; I heard him though and saw the fire from the gun strike in the eaves of the shed; I saw the fire from the gun over the top lattice fence.

70 Redirect examination.

I say that in my judgment he went into the water-closet—that is, judging from the sound of his footsteps; then there was a cessation of that sound, and then there was a sound indicating that he left the water-closet, and immediately after hearing these sounds of moving the gun was discharged.

Recross-examination:

Q. How long an interval was there between the time you heard him go into the closet and the time when he came out?

A. Time enough for me to notify them that some one had went back to the closet. When I heard sounds of a man coming out I immediately heard the report of a gun; just as he stepped out; I knew he stepped out; just as he stepped out the gun was discharged; that is all I heard. I can usually tell whether a man is stepping out on a sidewalk or falling. He did not fall out.

O. G. Beck, a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination:

I have lived in Helena about six years; am the brother of Frank E. Beck, deceased; he was four or five years older than I was. He was shorter than I am in the neighborhood of an inch. I lived with him until shortly before his death; lived there about four years. Mr. and Mrs. Beck were a very affectionate couple; he was very much attached to his little girl. He drank considerable at times, and at other times he didn't drink anything. He wouldn't
71 drink for two or three weeks sometimes, and then he would have little sprees. He had shorter arms than I have. I wish you would take hold of this gun. (Witness takes the gun heretofore referred to and places the stock on the floor and the muzzle against his eye in the manner and form in which the witness Flaherty said that the discharge of the gun took place, so as to make the mark under the eye which he testified to.) I wish you would try and reach the trigger of this gun.

By Counsel for the Defendant: We object to the testimony, because there is no evidence to show that this is the gun that was used in the killing of Frank E. Beck.

(Objection overruled; to which ruling of the court in overruling the objection of the defendant, the defendant then and there duly excepted.)

(The witness makes an effort to reach the trigger of the gun but is unable to do so. Counsel produces a coat.)

I know whose coat that is; it was my brother's, Frank E. Beck's; the sleeves are considerably too short for me. I know of a gun that was taken from Mr. Doughty's a short time before my brother died. I first became aware of it being in my brother's house after his death. I think I found the gun in the dining-room of my brother's house

after his death. I returned it to Mr. Doughty to the store there, to a man in charge of the store, and Mr. Doughty was there at the time; this was shortly after my brother's death; I don't know how long. It was not the Doughty gun that terminated the life of my brother. I know the gun known as Mrs. Beck's gun; it was a single-barrel shotgun; I don't think it was quite as long as
72 that gun (referring to a gun — the court-room). I wouldn't say for certain, because I never measured it; my impression is that it was as long as that gun though. I saw Mr. Beck's remains; I think it was the next day at Mr. Flaherty's shop; I didn't take any special notice of anything.

Cross-examination:

I am manager of the Parisian steam laundry now; I am employed by Mrs. Lillian Beck at this time. I happened to leave my brother's house because I didn't want to stay there any longer; I wanted to be right at the laundry where I could do my work. I didn't leave at my brother's request; he wanted me to stay there, and so did Mrs. Beck. (Counsel hands witness gun.) I guess if I had a pencil I could reach the trigger if I found it; I can't see it with the other eye; the barrel is in the way. If the stick was long enough I could reach it. I think it is possible to discharge the gun with a stick if you get it right. I don't know who it was told me that he had borrowed a gun from Mr. Doughty, and that it was at the house and was rented, and that he would be charged for the gun while it was there; somebody did. I wouldn't be sure just where this gun was in the dining-room; I found it myself. Sometimes the relations between my brother and Mrs. Beck were pleasant and sometimes they were not. My brother never said anything to me about dying; he never said anything about dying to anybody that I know anything about.

Redirect examination:

I saw the gun that was in the possession of the coroner. I
73 was present part of the time that the investigation was going on. I didn't notice the body to see what marks were on it, or if there were any there.

JOHN P. LINDNER, a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination:

My name is John P. Lindner; am a gun and lock smith; have been in that business since 1892. During my professional career I have had to do with the handling of firearms, and the discharging of them. I have had experience with firearms in respect to the ease or difficulty of discharging them.

Q. Taking, for instance, this gun as a sample of the genus gun, what would you call that?

A. Oh, it is a cheap gun. It is a shotgun; it is discharged by the manipulation of the trigger, by the finger or some other pressure.

That is not the only way of making it go off; you could take this and give it a good jar and you might possibly discharge it; it would take quite a good jar to discharge it. The hammer has got to be raised to discharge it, of course. A sudden stroke of that gun would set it off.

Cross-examination:

It would take quite a jar to discharge it.

Q. The locks of this gun are a little harder to discharge than an ordinary gun? (Counsel invites witness to jar the stock of the gun on the floor with the hammer raised to see if it will go off.)

By Counsel for Defendant: I would like to show your
74 honor that this gun won't go off in that way. If there is any damage done to the gun, we will see that he is none the loser by it. I desire to show by this witness that jarring the gun will not discharge it; I would like to have the records show that plaintiff's counsel objects to the gun being used in that way.

(Objection sustained by the court; to which ruling of the court the defendant, by its counsel, then and there duly excepted.)

In the event of a jar, the chances are that both barrels would not be discharged; one spring might be stronger than the other; it might take something more than a slight jar to send the gun off. I don't think you could discharge that gun with your shoe; there are a dozen ways to discharge a gun, of course. There are guns of different lengths; this is a thirty-two inch barrel; this would be a long barrel.

Redirect examination:

I don't see how this gun could be set off by a man's foot unless he had his shoe off. Mr. Loeb said it could be set off that way. I didn't say it could. I said the spring on one lock might be stronger than the one on the other lock; the bite in one might not be as strong as in the other. I think it would take a force of about nine pounds to pull this gun off; I could not tell how much of a shock it would take; I never tried it. I could not tell much about it from the examination I have made of it.

Q. How would it be, supposing a person were coming out
75 of a water-closet, it was pretty dark, and he had no intimation that there was this step there, a step about a foot and a half high, and carrying this gun in his hand, and in an attempt to recover himself that gun comes in contact with something suddenly—would you think the shock would set it off?

A. Well, I think it would if the shock was strong enough.

Recross-examination:

You could not discharge the gun by pressing on the hammers. You see these are binding locks, and you never could fire it off unless you pulled the trigger.

Mrs. LILLIAN H. BECK, the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is Lillian H. Beck; my age is 27, and I am the plaintiff. I was married to Mr. Frank E. Beck six years before his death; was married to him in Helena, Montana, and lived in Helena all the time; the little girl that was with me yesterday is my daughter, and the only child I have. Mr. Beck would drink occasionally after our marriage; he would be sometimes six months without drinking; he didn't drink much at first; he had been drinking about five days just before his death; he had been sober for six weeks before that. We got along very well when he wasn't drinking; he was unkind when he was drinking. We had some misunderstanding about six weeks before his death with reference to his drinking; we got reconciled again. One evening I spoke about the revolver being
76 about loaded; he shot it off and said something about it; I didn't pay much attention; he came in and said he was fooling. There was nothing said about his not having sense enough to kill himself; I was in the front room at the time. I have no recollection of the occurrence at Elliston that has been mentioned here in this case. I had a single-barrel shotgun, a very small one; there was one other gun there; that gun was longer than my gun, the other gun. I did not have much to say to Mr. Beck the five or six days before his death, while he was drinking. I saw him coming down the street two days before his death. I left the house and went over to Stedman's, because I was afraid of him. I saw Mr. Beck going home at noon on Dearborn avenue, two days before his death; he didn't see me. I had a conversation with him that morning down at the office; he was under the influence of liquor then. I told him if he did not stop drinking I would not go home until he did; that was on the street going home, about two days before October 31st. He said I had got to go home, anyhow. I said if he would stop drinking I would, and if he would not stop drinking I would not go home; then he became very angry and manifested his anger by swearing. I did not go home then; I went back to the office and he followed me. I started to go home out of the back way, and he came out after me, and I put on my things and went down-town, and when I came back I met my girl, and she says, "Don't you go home, he has got the guns." When I got to Mrs. Stedman's she says, "Don't you go home; you come in." I stayed at Mrs. Stedman's for two days preceding the 31st of October. I came to
77 your place about 4 o'clock the 31st; only my little girl accompanied me; it must have been six or seven in the evening when Mr. Beck came to your house. He tried the kitchen door; some one did; I don't know who it was. I called Mrs. Nolan; we were downstairs in the dining-room. I went upstairs and looked out of the window and saw Mr. Beck; he was at the bath-room window at the side of the house; it was light enough so that we could see him. He went away and came back shortly afterwards. We were upstairs when he came again. He rang on the door bell this

time; we just supposed it was him. I heard some one's voice—I knew it was Mr. Beck's voice. I heard Mr. Beck speak, he asked Mrs. Nolan to please let him in. She said, "The folks are all in bed; come around tomorrow morning." He got mad then, and somebody jumped down the steps and run up the street. Mrs. Nolan told him to stop that or she would call for help, and he stopped instantly. The next thing we heard him crash in the window; we were upstairs at the time in the back bed-room. We heard a gun discharged. Mr. Lynch wanted to go downstairs, and I asked him to please not to go. Mr. Lynch had a lantern. Mr. Lynch was upstairs at the time; I had hold of him. We couldn't see who had a gun from where we were. Mr. Lynch came up the back stairs, and as he came up I went into the front room, and then Mr. Lynch came in. (Witness describes the situation of the rooms.) I was standing right there when some one was coming upstairs; upon the person coming upstairs—the back stairs—I went forward into
78 the front room. I had hold of Mr. Lynch's coat at the time the gun was discharged. It was an impossibility to see the water-closet where we were standing. I did not see Mr. Beck shoot himself. I saw Mr. Beck's remains the next morning, when they were taken over to the house; that is, they brought them one evening, and I saw them the next morning. I was excited and hysterical after learning that Mr. Beck had died. Dr. Treacy was with me pretty near all night. The first night I was at Mrs. Nolan's and I went home the next day. You were not at home. You were out of the city the night that the gun was discharged that ended Mr. Beck's life. I did not make any inspection of my husband's remains when they were brought home. I saw them the next morning. I noticed the condition of his face the next morning after he was brought home in the evening. There was a semicircle mark under his le t eye. It was bruised black and blue. I appeared before the coroner the next day after Mr. Beck died, and that is when I gave the testimony that has been read to the jury.

Q. Do you know, or have you any recollection now as to your physical condition, whether you were suffering from nervousness or hysteria at the time?

By Counsel for the Defendant: We object to the question, for the reason that it is incompetent, irrelevant, and immaterial; the witness is not competent to testify to her physical condition at that time.

(Objection overruled; to which ruling of the court the defendant then and there duly excepted.)

79 A. I was almost crazy with nervousness. I went in with her—that is, she took me in, and Dr. Treacy gave me something to quiet my nerves. That was before I gave my testimony. I was not present before the coroner during the time all the evidence was being given. I was only there while they took my evidence, and I felt so bad that Mrs. Stedman took me home. I signed my name to the evidence which was given before the coroner's jury.

Q. I noticed in the original testimony in the handwriting of the

coroner a portion of your testimony: "So that he could telephone down for assistance. He (Mr. Beck) went from the front door to the side window in the dining-room and broke in the window, and was about entering the house, when the police officer came." You didn't see him do these things, did you?

A. No, that is just what they said. I was upstairs at the time this was transpiring downstairs. I could not see his movements.

Q. Now, I also see here when the police officer came, soon after this shot was fired which killed him out in the shed, and in the line above, "shot by his own hand."

A. I didn't say that. Mr. Pleasants most likely put that in. He would ask me one question, and I would say yes or no, and he would write down all he wanted to. I did not see him shoot himself. I don't know that he did shoot himself. I did not know as a matter of fact that he shot himself at the time I testified before the coroner's jury. That is also my signature to the proofs of death. You did all the writing in the body of the document, the proofs of
80 death. I did not tell you anything; it was filled out after the coroner's inquest, and the coroner's inquest declared that he had committed suicide, and that he was insane. I don't know whether Mr. Beck committed suicide, or whether he died accidentally, and I don't know now. I never heard Mr. Beck say he intended to commit suicide.

Cross-examination:

Mr. Beck and I did not have trouble about his desire to increase the size of our family. He was a great lover of children, and I liked the little girl very much. I can positively state that we never had any trouble of that kind. Mr. Votaw came down to Mr. Stedman's to see me just before Mr. Beck's death. I simply told him that Mr. Beck was drinking, and I would not go home until he stopped drinking; he said he thought that I had better go home, and I told Mr. Votaw that I thought I was the best judge of that. He did not tell me what seemed to trouble Mr. Beck; just as soon as he stopped drinking I intended to go home. I did not go home. I was afraid that Mr. Beck was agoing to kill me because I told him I wouldn't go home until he stopped drinking. I was just afraid. He made threats against my life; he said if I did not go and live with him he would kill me; that was within a month of the time of his death; he said it before that too; I can't tell how long. I went back to Mr. Beck with the understanding that he was to stop drinking, but not two years ago; I think it was six or seven weeks before he died. That was about the time that he threatened to kill me, and that was why I left; that was two occasions on which he threatened my life;
81 I cannot remember any other occasions now. Mr. Oscar Beck was staying at our house sometimes. Mr. Frank Beck was not jealous of Mr. Oscar Beck. I know Miss Hilda Carlson; she was employed by us as a domestic; about three years I think. I haven't counted it up. I remember the instance she spoke of Mr. Beck firing a pistol off in the bath-room; she says she was there at

that time. I don't know myself whether she was or not. I wouldn't undertake to say that she wasn't there. I meant there was no one in the front room when I replied to Mr. Nolan that there was no one in the house; he came in the room afterwards himself. He didn't call out to me that he had committed suicide. He said, "Well, I have shot myself," and came out laughing. I didn't get up to go when he said he had shot himself. The carving-knife episode at Elliston might have happened. I threw an ink bottle at him; it didn't hit him. I threw it because he was teasing. I don't remember throwing a knife at him.

Q. Now, Mrs. Beck, what made you change your mind that Mr. Beck had committed suicide?

A. I never had my mind made up.

Q. Did you not sign an affidavit to that effect?

A. I signed a paper.

Q. Did you swear to it before a notary?

A. Yes.

Q. Did you state in that affidavit that he committed suicide?

A. I did not.

Q. You signed it?

A. Yes; I signed it.

Q. Sign anything that is brought to you, do you?

82 A. It depends on who brings it. I certainly had full confidence in Mr. Nolan's judgment; he was acting as my legal adviser.

Q. Well, when did it first occur to you that Mr. Beck might have died by accident?

By Counsel for Plaintiff: We object to that as not being proper cross-examination. She states that she does not know whether his death was accidental or intentional; this question is put upon the assumption that her testimony was different.

(Objection sustained; to which ruling of the court the defendant's counsel then and there duly excepted.)

Q. When did it first occur to you that the statements contained in proofs of death were not true?

A. When you read them the other day.

Q. That is the first time it ever occurred to you, is it?

A. Why, I didn't know anything about what was in the papers. I signed proofs of death of the A. O. U. W. I didn't know what was in those papers. I got my money from them. I don't know whether the proofs of death stated that death resulted from suicide or not. I signed the proofs of death of the Maccabees too; they were sworn to. Mr. Nolan did not tell me that I would have to explain those proofs of death that were in evidence. He did not tell me that if I did not explain them the way I have I would lose my case. I don't hardly know what I was talking about at the coroner's jury; there are some things in it that are true. I did not know exactly what was in it until you read it here the other day—

83 what was in the testimony. I remember the testimony about sharpening the carving knife. "He stood there until he got

tired and went off into the other room and went to bed." That states it correctly. Mr. Beck's funeral took place from the — house, on Monday afternoon, the first of November. I was at the coroner's jury the Sunday afternoon.

Q. Is it not a fact, Mrs. Beck, that you have stated to a great number of persons in speaking about this case that there was no question but what Mr. Beck committed suicide, but that the company couldn't prove it?

By Counsel for the Plaintiff: I object to the question as not being proper, and not proper cross-examination.

(Objection sustained by the court; to which ruling of the court in sustaining the said objection the defendant then and there duly excepted.)

Dr. Treacy gave me opium. I presume I was under his care a couple of days. Mr. Nolan did not tell me exactly what the condition of the law was, at the close of the first day's trial. I went straight home. I said I had hold of Mr. Lynch's coat in the room about the time the shot was fired, and he broke away; I was excited.

Redirect examination:

I was upstairs at the time the gun was discharged. Mr. Tom Reece was upstairs with Mr. Lynch. That was not Mr. Frank Reece who testified here; that was his brother. Quite frequently I would throw pillows and things at Mr. Beck; that is what he teased me for. I had a single-barrel shotgun. I had an understanding with Mr. Beck that he was to quit drinking, or I would not live with
84 him; he straightened up for six weeks. We went to Elliston after we had the understanding. Mr. Beck, the girl, the baby and myself went. We took Mr. Beck's gun and mine. Mr. Beck had a mine and a ranch at Elliston. We were at Elliston six weeks. Mr. Beck was not drinking when we were at Elliston. We brought the guns back to Helena. We went to our own house when we got back to Helena. We took the guns home with us; they were standing in the dining-room, and I told the girl to take them and hide them; and she took them upstairs and hid them; she put them under the bed, under the mattress; that was three or four days before Mr. Beck died. There were no other guns in the house. The Sunday evening after Mr. Beck's death I made a search for the guns. I saw one standing in the corner of my bed-room. I ascertained afterwards that that was the gun that had been rented at Doughty's, and they took it back. After the girl searched for the guns she came down and said there was only one gun up there; that the others were gone.

Q. Do you know whose gun this is? (Counsel refers to the gun that has been in the court-room during the trial.)

A. That looks like Mr. Beck's gun.

Recross-examination:

I couldn't state positively that that is Mr. Beck's gun. All guns look alike to me. I didn't make any examination of Mr. Beck's gun. All I can say is that there was a gun there, and it was taken back to Mr. Doughty's.

Q. Then as a matter of fact you cannot identify this gun?

A. No, not positively.

85 O. G. Beck, recalled as a witness on behalf of the plaintiff.

Direct examination:

I don't know exactly how long after the death of Mr. Beck that it was alleged the killing was done with — remained in the possession of Mr. Pleasants, the coroner. I know what is known as the shorter gun. I last saw it when it was brought in from Elliston; it was brought in by my brother, Walter Beck, or by the boys that were out there; they came in together. It was after the killing of Mr. Beck that they brought it in. Mr. Beck had a gun of his own. That looks to me very much like his gun. (Witness refers to the gun which has been in court all the time during the trial.)

Plaintiff rests.

At the close of all the evidence the defendant, by its counsel, filed the following motion, and submitted the same for the consideration of the court, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Lillian H. Beck, Plaintiff,
vs.
Supreme Lodge, K. of P., Defendant.

Motion to Instruct the Jury.

86 Now comes the defendant herein and at the close of all the testimony herein adduced on the trial hereof, and moves the court to direct the jury to return a verdict for the defendant, on the following grounds:

I.

That by the testimony herein adduced it is shown that the plaintiff in her proofs of death furnished the defendant company stated under oath that the cause of death resulted from suicide, and that this statement is not shown to have been made by mistake or inadvertence, or in ignorance of material facts subsequently ascertained.

II.

That it appears from the testimony that the proofs of death furnished to the defendant company state under oath that the death of

Frank E. Beck resulted from suicide, and this statement is uncontradicted and unexplained by any evidence introduced by the plaintiff *by her* or on her behalf.

III.

That from the proofs of death as shown in evidence the cause of death of Frank E. Beck is declared to be "suicide" or "self-destruction," and that burden of proof is upon the plaintiff to show that the death of Frank E. Beck resulted from a cause other than suicide or self-destruction, and as no evidence has been introduced by her or on her behalf to prove her contention by a preponderance of the evidence, the law will not sustain a verdict for the plaintiff.

IV.

That burden of proof to prove accident is upon the plain-
87 tiff, under the proofs herein adduced, and that there has been no testimony introduced by the plaintiff to show that Frank E. Beck died from accidental cause.

V.

That under all the testimony herein adduced there is no conflict upon the point that the death of Frank E. Beck occurred while said Beck was attempting to and was actually violating the criminal law of the State of Montana, which of itself would defeat any right said beneficiary would have to recover under a contract of insurance herein.

VI.

That the verdict of the coroner's jury, which was presented as part of the proofs by the plaintiff in making her proofs of loss against the defendant company, state "that said jurors on their oaths do say that Frank E. Beck came to his death on the 31st day of October, 1896, by shooting himself in the head with a double-barrel shotgun, with the purpose and intent of committing suicide while temporarily insane, due probably to the use of intoxicants; that the shooting was done in the outside water-closet of the premises now occupied by the family of C. B. Nolan, and that he threatened to kill his wife before killing himself;" that plaintiff's action in furnishing the verdict of the coroner's jury as a portion of her proofs of loss made a *prima facie* case of suicide, and that it immediately became incumbent upon her to prove by a preponderance of the evidence that this verdict did not state correctly the cause of the death of Frank E. Beck, and as no evidence has been adduced by her or on her behalf tending
88 to prove this contention, the verdict stands against her as correctly showing the cause of death of Frank E. Beck, and no verdict can be sustained against the defendant.

VII.

That under all the evidence herein adduced a verdict for the plaintiff could not be supported in law.

VIII.

That generally under the law and the evidence herein adduced the defendant is entitled to a verdict and a direction of the court to the jury to return a verdict for the defendant.

ALBERT I. LOEB.
Attorney for Defendant.

But the court overruled the said motion of the defendant to instruct the jury to return a verdict for the defendant; to which ruling of the court in overruling the motion of said defendant aforesaid the defendant then and there, by its counsel, duly excepted.

And thereupon the defendant duly tendered to the court and asked the court to give the following instructions, to wit: "In an action on a life-insurance policy if there be doubt whether the death of the assured was the result of accident or suicide, the doubt should be solved in favor of the theory of accident; but if the plaintiff has in her proof of death stated that the death was suicide, it is incumbent upon her to satisfy the jury that she was mistaken in this statement and the death was caused by accident, and unless she has done so by a preponderance of the testimony, you will find for
89 the defendant." Which said instruction the court refused to give; to which refusal the defendant then and there duly excepted, as required by the rules of the court.

And thereupon the defendant duly tendered to the court and asked the court to give the following instruction to the jury, to wit: "The jury are instructed that there is no presumption that the assured died from natural cause, and not from suicide, but this matter must be determined by you upon the preponderance of evidence with regard to the party having the burden of proof. But since the introduction into this case of the proof of loss furnished by the plaintiff to defendant company, there is a presumption that he died from suicide and unless the plaintiff has, by a preponderance of evidence, proven that Frank E. Beck died from accidental cause, you will find for the defendant." Which said instruction the court refused to give to the jury; to which refusal of the court the defendant then and there duly excepted as required by the rules of the court.

And thereupon the defendant duly tendered to the court and asked the court to give the following instruction to the jury, to wit: "The jury are further instructed that in civil causes of this nature, the law requires the party having what is called the burden of proof resting on him to prove his case by a preponderance of evidence, and if he fails to do so, then it is the duty of the jury to return a verdict for the other party. In the case now on trial the burden of proving that Frank E. Beck came to his death by suicide was upon the defendant company; up to the time it appeared in this
90 case by the testimony offered that the plaintiff, Lillian H. Beck, in her proofs of death furnished to the defendant, stated under oath that the death of Frank E. Beck, the assured, resulted from suicide, from that instant the burden of proof shifted to the plaintiff, and before you can find a verdict in her favor, you must be

satisfied that a preponderance of all the evidence in this case tends to prove that Frank E. Beck died from an accident, and unless you so believe, you should return your verdict for the defendant; that is, the plaintiff must prove by a preponderance of evidence that the said Frank E. Beck's death resulted from an accident, and unless she has done so, you will find for the defendant." Which said instruction the court refused to give to the jury; to which refusal of the court the defendant then and there duly excepted as required by the rules of the court.

And thereupon the defendant duly tendered to the court and asked the court to give the following instruction to the jury, to wit: "Gentlemen of the jury, you will notice that in the proofs of death made and furnished to the defendant by the beneficiary, Lillian H. Beck, the plaintiff herein, under the policy or certificate upon which this suit is brought, it is stated under oath that the death of Frank E. Beck resulted from suicide. Under the law, this throws the burden of proof on the plaintiff to show that the statements in the proofs of loss as to the manner of the death of Frank E. Beck were made by mistake, or under a misapprehension of the facts, and unless the statements made by her in the said proofs of loss so furnished to the said defendant as to the manner
91 of the death of Frank E. Beck are overcome by proof adduced by her, showing that her husband came to his death by accident or some other causes other than suicide, the proofs so furnished stand as conclusive evidence of the cause of death of the said Frank E. Beck, and you will find that he committed suicide, in accordance therewith, and your verdict must be for the defendant." Which said instruction the court refused to give; to which refusal of the court the defendant then and there duly excepted as required by the rules of the court.

And thereupon the defendant duly tendered to the court and asked the court to give the following instruction to the jury, to wit: "The jury are instructed that as a matter of law governing cases of this character it is held that representations made in the proofs of death as to the manner of death of the assured are intended for the action of the insurance company, and upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. The burden put upon the plaintiff by the representation of suicide makes the case one where she must show that her husband did not purposely kill himself." Which said instruction the court refused to give; to which refusal of the court then and there the defendant duly excepted as required by the rules of the court.

And thereupon the defendant duly tendered to the court
92 and asked the court to give the following instruction to the jury, to wit: "That if the jury find that Frank E. Beck's death occurred while violating the criminal laws of the State of Montana, or while in an attempt at the violation thereof, no matter what they believe the cause of death—suicide or accident—the

plaintiff cannot recover under this policy, and you will find a verdict for the defendant." Which instruction the court refused to give; to which refusal of the court the defendant then and there duly excepted as required by the rules of the court.

And thereupon the defendant duly tendered to the court and asked the court to give the following instruction to the jury, to wit: "You are further instructed that in coming to a verdict in this case *they* will take into consideration the conflicting statements herein, and in believing the one and disregarding the other, *they* will look to the interest of the parties who make the same; in the event of this action, if different statements are made at different times, you are at liberty to believe the one and disregard the other. By the introduction of the proofs of loss delivered by the plaintiff to the defendant, the presumption is that Frank E. Beck committed suicide, and unless the plaintiff has introduced testimony to prove accidental death by a preponderance of evidence, you will find for the defendant." Which instruction the court refused to give; to which refusal of the court the defendant then and there duly excepted as required by the rules of the court.

And thereupon the defendant duly tendered to the court
93 and asked the court to give the following instruction to the jury, to wit: "If Beck died while attempting to or while violating the criminal laws of the State plaintiff has no claim under the contract between Frank E. Beck and the defendant that would entitle her to a verdict, and you are instructed, if you find he was attempting to violate, or was violating the criminal laws of this State at the time of his death, that plaintiff cannot recover, and you will find for the defendant." Which instruction the court refused to give; to which refusal of the court the defendant then and there duly excepted as required by the rules of the court.

And the defendant also at the time, and before the jury retired to consider of their verdict, as required by the rules of the court, excepted in writing to the following portions of the charge of the court as given, to wit: "The defendant has offered in evidence the proofs of death of Frank E. Beck, and has also offered in evidence the testimony of the witnesses at the coroner's inquest and the verdict of the coroner's jury. This evidence, under the law, it is proper for you to consider, but you are instructed that it is not conclusive upon the plaintiff; nor is the plaintiff estopped from showing a condition different from that suggested by such proofs of death or verdict."

Also the following portion of the charge as given: "You are instructed that in considering this evidence you must do so in the light of the explanations made by the plaintiff, and in that connection you are at liberty—nay more, it is your duty to consider whether
or not the conclusion set forth is warranted by the evidence
94 upon which such conclusion is based, for after all it is for you to say whether or not upon the evidence the plaintiff was justified in saying that the death was intentional rather than accidental, and so likewise it is your duty to say whether the coroner's jury, on the evidence before it, could consistently find that the death was suicidal rather than accidental. In considering this feature of

case it is not only your duty to consider the verdict of the coro-
r's jury, but also to consider the evidence which was adduced
fore that coroner's jury. So likewise it is your duty not merely
consider the proofs of death furnished to the company, but it is
ur duty to consider the circumstances surrounding the presenta-
on of such proofs, and the evidence which the plaintiff had respect-
g the question as to whether the death of Frank E. Beck was ac-
dental or intentional at the same time she signed those proofs of
eath, and in this connection it is proper for you to consider as to
here she was at the time the gun was discharged, and whether she
ould see her husband at that particular time, and if upon the whole
vidence, with explanations offered as to how those proofs came to be
ubmitted, and considering all of the evidence in the case now before
ou, you are not satisfied by a preponderance of the evidence that
rank E. Beck did kill himself, then I tell you that under those cir-
umstances the plaintiff is entitled to a verdict, and your verdict
hould be so declared."

Also the following portions of the charge as given: "I have
95 already told you that the law presumes that the death was
accidental. This presumption arises from the fact that it
is the general experience of mankind that people do not take
heir own lives; that the love for life is so strong in the human
breast, the law presumes that no act will be done by the person to
abridge the period of his existence. This presumption of law dis-
penses with the necessity of evidence that the death was not inten-
tional on the part of the plaintiff. Before the defendant is entitled
to a verdict, this presumption must be overcome by a preponderance
of the evidence. That is to say, the evidence must show you that
notwithstanding this presumption, the death of Frank E. Beck in
this instance was occasioned by an intentional act of his, whether
sane or insane, and unless you find that this was so, that he inten-
tionally discharged the gun for the purpose of taking his life, you
must find for the plaintiff."

Also the following portion of the charge as given: "Again, if
upon the consideration of all of the evidence you cannot say with
any degree of certainty as to how he met his death—that is to say,
you cannot tell whether he intentionally discharged the gun with
the purpose of killing himself, or whether it was accidentally dis-
charged in some way or other, this likewise would be a case where
the plaintiff would be entitled to a verdict; for as I have told you,
the burden is upon the defendant company to show that the dis-
charge of the gun was intentional for the purpose of terminating
the life of Mr. Beck."

Also the following portion of the charge as given: "The
96 declaration of the plaintiff in her statement as to the cause of
the death of her husband, Frank E. Beck, has been admitted
in evidence in this case. This admission or declaration was to the
effect that said Beck had committed suicide while insane. If this
admission was not overcome or counterbalanced by other evidence
in the case, this admission would warrant you in finding that the
deceased, Beck, came to his death as in the statement set forth. If,

however, the evidence shows that plaintiff made this declaration from what she heard from others, and from no adequate knowledge on her part of the cause of her husband's death, then you are at liberty to disregard this declaration, and if there is no other evidence tending to show that the said Beck committed suicide, and you find that you should disregard this declaration, then you would not be justified in finding that the said Beck did commit suicide. I would not say to you that there is no evidence bearing upon the question as to whether the said Beck committed suicide but this declaration. The evidence as to the cause of said Beck's death given before the coroner's jury was made a part of plaintiff's statement; it is for you to say whether or not this evidence would justify said jury in finding the verdict rendered by it, and the admission of the plaintiff. Suicide may be proven by circumstances. The question, then, is presented to you as to whether the evidence is sufficient to find that said Beck did commit suicide."

Also the following portion of the charge as given: "The investigation narrows itself down to the question as to whether the
97 death of Frank E. Beck was an act of suicide, whether voluntary or involuntary, while sane or insane, or whether it was accidental."

Also the following portion of the charge as given: "The plaintiff has exhibited the policy in evidence, and has given evidence of the fact that the insured died, and it being admitted that the insured was in good standing at the time of his death, this makes a *prima facie* case for the plaintiff, which has to be overcome by the defendant."

Also the following portion of the charge as given: "It is manifest that self-destruction cannot be presumed; so strong is the instinctive love for life in the human breast, so uniform the efforts of men to preserve their existence, that suicides cannot be presumed. The plaintiff is therefore entitled to recover unless the defendant has by competent evidence overcome this presumption, and satisfied you by a preponderance of the evidence that the injuries which caused the death of the insured were intentional on his part."

Also the following portion of the charge as given: "The burden of proving this allegation by a preponderance of the evidence rests on the defendant. The presumption is that the death was not voluntary, and the defendant, in order to sustain the issue of suicide on its part, must overcome this presumption, and satisfy the jury that the death was intentional; that is to say, the law presumes in this case that the death was accidental and not intentional in the absence of any evidence, and without any proof being adduced either way as to the circumstances attendant upon the death, the plaintiff would be entitled to recover. Before that right to recover is
98 defeated, the defendant is required to satisfy you by evidence in this case that the death was intentional—in other words, that the insured committed suicide, and unless this has been done by a preponderance of evidence, so as to overcome the legal presumption that the death was not intentional, your verdict should be for the plaintiff."

Also the following portion of the charge as given: "The defendant contends that the insured committed suicide. The burden of proving this fact devolves upon it, and unless you are satisfied by a preponderance of the evidence that death was occasioned by suicide, your verdict must be for the plaintiff."

Also the following portion of the charge to the jury as given: "You are the judges of the credibility of the witnesses, and you are also the judges of the facts in this case, and it is for you to say from all the evidence introduced, and the circumstances concerning this case, whether it is not just as likely that the gun in question was accidentally discharged as that it was intentionally discharged; and unless the defendant has satisfied you by a preponderance of the evidence that the gun in question was intentionally discharged, your verdict should be for the plaintiff; for, as already explained to you, the law presumes that the gun was accidentally discharged, and it is only when proof is adduced, or the circumstances are of such a character as to overcome this presumption, that you are justified in finding a verdict for the defendant."

Also the following portion of the charge as given to the
99 jury: "You are further instructed in this connection that if upon the consideration of all the facts in the case, and likewise taking into consideration all of the circumstances, including this presumption of law that I have called your attention to, your minds are in such a condition that you are uncertain whether the death was accidental, or whether it was intentional, in this event the defendant would have failed to have made out its case by a preponderance of the evidence, and the plaintiff would be entitled to a verdict."

Also the following portion of the charge as given to the jury: "Here is an instruction asked, which I refused, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed he cannot recover. But if a man contemplating that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply."

Also the following portion of the charge as given to the jury: "It has been stated here in the argument, and I told Mr. Loeb that I would not give it, that when there is this admission on the part of the plaintiff that death was occasioned by suicide, that then the burden of proof is shifted, and it was necessary for the plaintiff to show that it was accidental. If the proofs overcome this ad-
100 mission, and showed that it was not correct—that it was wrong, why then it should not control your action. In no case that I know of is such a rule maintained, unless by some decision in regard to the insurance companies. A man may admit something from a lack of knowledge upon the subject, and if it turns out afterwards that he was misinformed, that he had not any adequate

knowledge upon the subject, that admission may be disregarded, and should be disregarded. A man is only estopped from denying his admissions and declarations when it would work a fraud upon the other party; and there is no claim in this case—no claim that it would work a fraud on the defendant in this respect."

Also the following portion of the charge as given to the jury: "There is only evidence before you that he was killed by a gun discharged through his head, and whether that was done with the intent by himself to commit suicide is for you to determine. If you are unable to determine that fact, then you should find for the plaintiff, because the presumption is that he didn't do it intentionally."

The foregoing is submitted by defendant as a proposed bill of exceptions and bill of demurrer in the above action, and — prays that the same may be settled and allowed.

ALBERT I. LOEB,
Attorney for Defendant.

It is hereby stipulated and agreed by and between the plaintiff and the defendant that the foregoing contains a true and cor-
101 rect statement of the evidence as given upon the trial, and the same may be settled and allowed by the judge of this court as a true and correct bill of exceptions in the above-entitled case.

C. B. NOLAN,
Attorney for Plaintiff.
ALBERT I. LOEB,
Attorney for Defendant.

Defendant having prayed that the foregoing statement may be allowed as a bill of demurrer and exceptions in the above-entitled case, and the same upon examination appearing to conform to the truth, it is ordered that such prayer be granted, and that the statement be so allowed as a bill of exceptions, and be filed as a record in this cause.

Dated June 7th, 1898.

HIRAM KNOWLES,
U. S. District Judge.

Service of a copy of the foregoing bill of exceptions and demurrer to the evidence is hereby admitted, and a copy thereof waived, this 7th day of June, 1898.

C. B. NOLAN,
Attorney for the Plaintiff.

(Endorsed:) Filed and entered June 7th, 1898. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 29th day of June, 1898, an assignment of errors was filed herein, which said assignment of errors is in the words and figures as follows, to wit:

102 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

LILLIAN H. BECK, Plaintiff,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant.

Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the case, to wit:

I.

The court erred in overruling and denying the motion of the defendant, made at the close of the evidence in the case, to instruct the jury to bring in a verdict for the defendant.

II.

The court erred in sustaining the plaintiff's objection to the testimony offered by the defendant as to the character of guns carried in stock by witness Doughty, and to the effect that said witness had in his possession several lengths of guns called the Belgium gun, some long-barreled and some short barrels, and that so far as the recollection of the witness is concerned he does not know whether it was a long or short barreled gun that was borrowed by Mr. Beck.

103 III.

The court erred in sustaining plaintiff's objection to the testimony offered by the defendant by the witness Reece as to what were the indications as to the manner of the death of Frank E. Beck, as to indicating suicide or otherwise.

IV.

The court erred in overruling defendant's objection and permitting the witness O. G. Beck to use in illustration the long-barrel gun, as there was no evidence that there was used in the killing of Beck any particular gun, and especially no evidence that the gun used in illustration did the killing.

V.

The court erred in sustaining plaintiff's objection in objecting to allowing, and in refusing to allow, the witness Linder to jar the stock of the gun on the floor with the hammers raised to see whether it would go off from a jar.

VI.

The court erred in overruling the objection of the defendant to the testimony offered by Lillian Beck as to her physical condition.

VII.

The court erred in sustaining the objection of the plaintiff to the defendant asking the question of the plaintiff: "When did it first occur to you that Mr. Beck might have died by accident?"

VIII.

The court erred in sustaining the plaintiff's objection and
104 not permitting the defendant to ask the plaintiff the following question: "Is it not a fact, Mrs. Beck, that you have stated to a great number of persons in speaking about this case that there was no question but that Mr. Beck committed suicide, but the company couldn't prove it?"

IX.

The court erred in refusing to give the following instructions tendered by the defendant, to wit: "In an action on a life-insurance policy, if there be doubt whether the death of the assured was the result of accident or suicide, the doubt should be solved in favor of the theory of accident; but if the plaintiff has in her proofs of death stated that the death was by suicide, it is incumbent upon her to satisfy the jury that she was mistaken in this statement, and the death was caused by accident, and unless she has done so by a preponderance of the testimony, you will find for the defendant."

X.

The court erred in refusing to give the following instruction tendered by the defendant: "The jury are further instructed that there is no presumption that the assured died from natural causes, and not from suicide, but this matter must be determined by you upon the preponderance of evidence with regard to the party having the burden of proof. But since the introduction into this case of the proof of loss furnished by the plaintiff to defendant company, there is a presumption that he died from suicide, and unless the plaintiff has, by a preponderance of evidence proven that Frank E. Beck died from accidental causes, you will find for the defendant."

105 XI.

The court erred in refusing to give the following instruction tendered by the defendant: "The jury are further instructed that in civil causes of this nature the law requires the party having what is called the burden of proof resting on him to prove his case by a preponderance of the evidence, and if he fails so to do, then it is the duty of the jury to return a verdict for the other party. In the case now on trial the burden of proving that Frank E. Beck came to his death by suicide was upon the defendant company; up to the time that it appeared in this case by the testimony offered that the plaintiff, Lillian H. Beck, in her proofs of death furnished to the defendant, stated under oath that the death of Frank E. Beck the assured, resulted from suicide from that instant the burden of proof shifted to the plaintiff, and before you can find a verdict in her favor, you

must be satisfied that a preponderance of all the evidence in this case tends to prove that Frank E. Beck died from an accident, and unless you so believe, you should return your verdict for the defendant; that is, the plaintiff must prove by a preponderance of evidence that the said Frank E. Beck's death resulted from an accident, and unless she has done so, you will find for the defendant."

XII.

The court erred in refusing to give the following instruction tendered by the defendant: "Gentlemen of the jury, you will notice that in the proofs of death made and furnished to the defendant by the beneficiary, Lillian H. Beck, the plaintiff herein, under
106 the policy or certificate upon which this suit is brought it is stated under oath that the death of Frank E. Beck resulted from suicide. Under the law, this throws the burden of proof on the plaintiff to show that the statements in the proofs of loss as to the manner of the death of Frank E. Beck were made by mistake, or under a misapprehension of the facts, and unless the statements made by her in the said proofs of loss so furnished to the said defendant as *by her in the said proofs of loss so furnished to the said defendant as* to the manner of the death of Frank E. Beck are overcome by proof adduced by her, showing that her husband came to his death by accident, or from some other causes other than suicide, the proofs so furnished stand as conclusive evidence of the cause of death of the said Frank E. Beck, and you will find that he committed suicide in accordance therewith, and your verdict must be for the defendant."

XIII.

The court erred in refusing to give the following instruction tendered by the defendant: "The jury are instructed that, as a matter of law governing cases of this character, it is held that representations made in the proofs of death as to the manner of death of the assured are intended for the action of the insurance company, and upon the truth of such representations must be held to them until it is shown that they were made under a misapprehension of the facts or in ignorance of material matters subsequently ascertained.
The burden put upon the plaintiff by the representation of
107 suicide makes the case one where she must show that her husband did not purposely kill himself."

XIV.

The court erred in refusing to give the following instruction tendered by the defendant: "That if the jury find that Frank E. Beck's death occurred while violating the criminal laws of the State of Montana, or while in an attempt at the violation thereof, no matter what they believe was the cause of death, suicide or accident, the plaintiff cannot recover under this policy and you will find a verdict for the defendant."

XV.

The court erred in refusing to give the following instruction tendered by the defendant: "You are further instructed that in coming to a verdict in this case you will take into consideration the conflicting statements herein, and in believing the one and disregarding the other, *they* will look to the interest of the parties who make the same; in the event of this action, if different statements are made at different times, you are at liberty to believe the one and disregard the other. By the introduction of the proofs of loss delivered by plaintiff to the defendant, the presumption is that Frank E. Beck committed suicide, and unless the plaintiff has introduced testimony to prove accidental death by a preponderance of evidence, you will find for the defendant."

XVI.

The court erred in refusing to give the following instruction
108 tendered by the defendant: "If Beck died while attempting to or while violating the criminal laws of the State, plaintiff has no claim under the contract between Frank E. Beck and the defendant that would entitle her to a verdict, and you are instructed if you find he was attempting to violate, or was violating the criminal laws of this State at the time of his death, that plaintiff cannot recover, and you will find for the defendant."

XVII.

The court erred in giving the following part of the charge as given: "The defendant has offered in evidence the proofs of death of Frank E. Beck, and has also offered in evidence the testimony of the witnesses at the coroner's inquest, and the verdict of the coroner's jury. This evidence, under the law, it is proper for you to consider, but you are instructed that it is not conclusive upon the plaintiff nor is the plaintiff estopped from showing a condition different from that suggested by such proofs of death or verdict."

XVIII.

The court erred in giving the following part of the charge as given: "You are instructed that in considering this evidence you must do so in the light of the explanations made by the plaintiff, and in this connection you are at liberty—nay more, it is your duty to consider whether or not the conclusion set forth is warranted by the evidence upon which such conclusion is based, for after all it is for you to say whether or not upon the evidence plaintiff was justified in saying that the death was intentional, rather than accidental,
and so likewise is it your duty to say whether the coroner's
109 jury, on the evidence before it, could consistently find that the death was suicidal, rather that accidental. In considering this feature of the case, it is not only your duty to consider the verdict of the coroner's jury, but also to consider the evidence which was adduced before that coroner's jury. So likewise it is your duty

not merely to consider the proofs of death furnished to the company, but it is your duty to consider the circumstances surrounding the presentation of such proofs and the evidence which the plaintiff had respecting the question as to whether the death of Frank E. Beck was accidental or intentional at the time she signed those proofs of death, and in this connection it is proper for you to consider as to where she was at the time the gun was discharged, and whether she could see her husband at that particular time, and if upon the whole evidence, with explanations offered as to how those proofs came to be summitted, and considering all of the evidence in the case now before you, you are not satisfied by a preponderance of the evidence that Frank E. Beck did kill himself intentionally, then I tell you that under those circumstances the plaintiff is entitled to a verdict, and your verdict should be so declared."

XIX.

The court erred in giving the following part of the charge as given: "I have already told you that the law presumes that the death was accidental. This presumption arises from the fact that it is the general experience of mankind that people do not take their own lives; that the love of life is so strong in the human breast the law presumes that no act will be done by the person to
110 abridge the period of his existence, and this presumption of law dispenses with the necessity of evidence that the death was not intentional on the part of the plaintiff. Before the defendant is entitled to a verdict, this presumption must be overcome by a preponderence of the evidence. That is to say, the evidence must show you that notwithstanding this presumption the death of Frank E. Beck in this instance was occasioned by an intentional act of his, whether sane or insane, and unless you find that this was so, that he intentionally discharged the gun for the purpose of taking his life, you must find for the plaintiff."

XX.

The court erred in giving the following part of the charge as given: "Again, if upon the consideration of all the evidence you cannot say with any degree of certainty as to how he met his death—that is to say, you cannot tell whether he intentionally discharged the gun with the purpose of killing himself, or whether it was accidentally discharged in some way or other, this likewise would be a case where the plaintiff would be entitled to a verdict; for, as I have told you, the burden is upon the defendant company to show that the discharge of the gun was intentional for the purpose of terminating the life of Mr. Beck."

XXI.

The court erred in giving the following part of the charge as given: "The declaration of the plaintiff in her statement as to the cause of the death of her husband, Frank E. Beck, has been
111 admitted in evidence in this case. This admission or declaration was to the effect that said Beck had committed suicide

while insane. If this admission was not overcome or counterbalanced by other evidence in the cause, this admission would warrant you in finding that the deceased, Beck, came to his death as in the statement set forth. If, however, the evidence shows that plaintiff made this declaration from what she heard from others, and from no adequate knowledge on her part of the cause of her husband's death, then you are at liberty to disregard this declaration, and if there is no other evidence tending to show that the said Beck committed suicide, and you find that you should disregard this declaration, then you would not be justified in finding that said Beck did commit suicide. I would not say to you that there is no evidence bearing upon the question as to whether the said Beck committed suicide but this declaration. The evidence as to the cause of said Beck's death given before the coroner's jury was made a part of plaintiff's statement; it is for you to say whether or not this evidence would justify said jury in finding the verdict rendered by it, and the admission of plaintiff. Suicide may be proven by circumstances. The question, then, is presented to you as to whether the evidence is sufficient to find that said Beck did commit suicide."

XXII.

The court erred in giving the following part of the charge as given: "The investigation narrows itself down to the question as to whether the death of Frank E. Beck was an act of suicide, whether voluntary or involuntary, while sane or insane, or whether it was accidental."

112 XXIII.

The court erred in giving the following portion of the charge as given: "The plaintiff has exhibited the policy in evidence, and has given evidence of the fact that the insured died, and it being admitted that the insured was in good standing at the time of his death, this makes a *prima facie* case for the plaintiff, which has to be overcome by the defendant."

XXIV.

The court erred in giving the following charge as given: "It is manifest that self-destruction cannot be presumed. So strong is the instinctive love for life in the human breast, so uniform the efforts of men to preserve their existence, that suicide cannot be presumed. The plaintiff is therefore entitled to recover, unless the defendant has by competent evidence overcome this presumption and satisfied you by a preponderance of the evidence that the injuries which caused the death of the insured were intentional on his part."

XXV.

The court erred in giving the following part of the charge as given: "The burden of proving this allegation by a preponderance of the evidence rests on the defendant. The presumption is that the death was not voluntary, and the defendant, in order to sustain

the issues of suicide on its part, must overcome this presumption, and satisfy the jury that the death was intentional; that is to say, the law presumes in this case that the death was accidental
113 and not intentional in the absence of any evidence, and without any proof being adduced either way as to the circumstances attendant upon the death, the plaintiff would be entitled to recover. Before that right to recover is defeated, the defendant is required to satisfy you by evidence in this case that the death was intentional, in other words, that the insured committed suicide, and unless this has been done by a preponderance of the evidence, so as to overcome the legal presumption that the death was not intentional, your verdict should be for the plaintiff."

XXVI.

The court erred in giving the following part of the charge as given: "The defendant contends that the insured committed suicide. The burden of proving this fact devolves upon it, and unless you are satisfied by a preponderance of the evidence that death was occasioned by suicide, your verdict must be for the plaintiff."

XXVII.

The court erred in giving the following part of the charge as given: "You are the judges of the credibility of the witnesses, and you are also the judges of the facts in this case, and it is for you to say from all the evidence introduced, and the circumstances concerning this case, whether it is not just as likely that the gun in question was not accidentally discharged as that it was intentionally discharged; and unless the defendant has satisfied you by a preponderance of the evidence that the gun in question was intentionally discharged, your verdict should be for the plaintiff, for, as already explained to you, the law presumes that the gun was
114 accidentally discharged, and it is only when proof is adduced, or the circumstances are of such a character as to overcome this presumption, that you are justified in finding a verdict for the defendant."

XXVIII.

The court erred in giving the following part of the charge as given: "You are further instructed in this connection, that if upon consideration of all the facts in the case, and likewise taking into consideration all of the circumstances, including the presumption of law that I have called your attention to, your minds are in such a condition that you are uncertain whether death was accidental or whether it was intentional, in this event the defendant would have failed to have made out its case by a preponderance of the evidence, and the plaintiff would be entitled to a verdict."

XXIX.

The court erred in giving the following part of the charge as given: "Here is an instruction asked, which I refused, and I wish to state here that is the instruction that if Frank E. Beck was vio-

lating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed, he cannot recover. But if a man, contemplating that he was going to kill his wife if she didn't go home with him, but was not in the
115 act and doing that at the time he was killed, that clause of the policy does not apply."

XXX.

The court erred in giving the following part of the charge as given: "It has been stated here in the argument, and I told Mr. Loeb I would not give it, that when there is this admission on the part of the plaintiff that death was occasioned by suicide, that then the burden of proof is shifted, and it was necessary for the plaintiff to show that it was accidental. If the proofs overcome this admission, and showed that it was not correct—that it was wrong—why, then, it should not control your action. In no case that I know of is such a rule maintained, unless by some decisions in regard to insurance companies. A man may admit something from a lack of knowledge upon the subject, but if it turns out afterwards that he was misinformed, that he had not any adequate knowledge upon the subject, that admission may be disregarded, and should be disregarded. A man is only estopped from denying his admissions and declarations when it would work a fraud upon the other party; and there is no claim in this case—no claim that it would work a fraud on the defendant in this respect."

XXXI.

The court erred in giving the following part of the charge as given: "There is only evidence before you that he was killed by a gun discharged through his head, and whether that was done with the intent by himself to commit suicide is for you to determine. If you are unable to determine that fact, then you should find
116 for the plaintiff, because the presumption is that he didn't do it intentionally."

ALBERT I. LOEB,
Attorney for Defendant.

(Endorsed:) Title of court and cause. Assignment of errors. Filed and entered June 29th, 1898. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 29th day of June, 1898, a petition for writ of error and an order allowing a writ were filed and entered herein in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

LILLIAN H. BECK, Plaintiff,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant.

Petition for Writ of Error and Order Allowing Same.

And now comes The Supreme Lodge, Knights of Pythias of the World, defendant herein, and says that on the 19th day of May, 1898, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had thereunto in this cause certain errors — committed, to the
117 prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the ninth circuit for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said circuit court of appeals.

ALBERT I. LOEB,
Attorney for Defendant.

Let the writ of error issue as herein prayed.

HIRAM KNOWLES,
Judge of the Circuit Court of the United States, Ninth Circuit, District of Montana.

(Endorsed:) Title of court and cause. Petition for writ of error and order. Filed and entered June 29th, 1898. Geo. W. Sproule, clerk.

And on said 29th day of June, 1898, a bond on writ of error was duly approved and filed in the words and figures as follows, to wit:

118 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

LILLIAN H. BECK, Plaintiff,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, the Supreme Lodge, Knights of Pythias of the World, as principal, and Albert J. Seligman and Ed. I. Zimmerman as sureties, are held and firmly bound unto the above-named plaintiff, Lillian H. Beck, in the sum of five thousand ($5,000.00) dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves

and each of us and each of our successor or successors in interest, our heirs, executors, administrators, and assigns, and each and every of them jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of June, A. D. 1898.

Whereas, the above-named defendant, The Supreme Lodge, Knights of Pythias of the World, has sued out a writ of error to the United States circuit court of appeals for the ninth circuit, to reverse the judgment rendered in the above-entitled action by the
119 judge of the circuit court of the United States for the district of Montana:

Now, therefore, the condition of this obligation is such, that if the above-named Supreme Lodge, Knights of Pythias of the World, shall prosecute said writ of error to effect, and answer all damages and costs, if it fails to make said writ of error good, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
By PHILIP T. COLGROVE,
Supreme Chancellor, S. K. R. S.

Attest:
[SEAL.] R. L. C. WHITE,
Supreme Keeper Records and Seals.

ALBERT J. SELIGMAN.
ED. I. ZIMMERMAN.

Signed and sealed in the presence of—
W. C. RIDDLE.

Approved and supersedeas allowed this 29th day of June, 1898.
HIRAM KNOWLES,
U. S. District Judge.

(Endorsed:) Title of court and cause. Bond. Filed and entered June 29, 1898. Geo. W. Sproule, clerk.

120 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth circuit, district of Montana, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Lillian H. Beck, plaintiff, and Supreme Lodge, Knights of Pythias of the World, defendant, a manifest error hath happened, to the great damage of the said Supreme Lodge, Knights of Pythias of the World, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby

commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at San Francisco, State of California, thirty days from the date hereof, in the said United States circuit court of appeals, ninth circuit, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States circuit court of appeals for the ninth circuit may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

121 Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 29th day of June, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and 22d.

The above writ of error is hereby allowed.

HIRAM KNOWLES,
U. S. District Judge.

Attest:
[SEAL.] GEO. W. SPROULE, *Clerk.*

The Answer of the Judges of the Circuit Court of the United States for the District of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said court, to the United States circuit court of appeals for the ninth circuit, within mentioned, at the date and place within mentioned, in a certain schedule to this writ annexed, as within I am commanded.

By the court:
[SEAL.] GEO. W. SPROULE, *Clerk.*

Due service of within writ of error by copy admitted this 30th day of June, 1898.

C. B. NOLAN,
Att'y for Pl'ff, Lillian H. Beck.

Copy deposited for defendant in error in office clerk U. S. circuit court for the district of Montana.

(Endorsed:) Filed and entered June 30, 1898. Geo. W. Sproule, clerk.

122 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Lillian H. Beck, plaintiff and defendant in error, and C. B. Nolan, her attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held

at the city of San Francisco, in the State of California, thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Montana, wherein Supreme Lodge, Knights of Pythias of the World, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Knowles, United States district judge for the district of Montana, this 29th day of June, A. D. 1898, and of the Independence of the United States the one hundred and 22d.

HIRAM KNOWLES,
U. S. District Judge, District of Montana.

Due service of within citation by copy is hereby admitted at Helena, Montana, this 30th day of June, 1898.

C. B. NOLAN,
Att'y for Lillian H. Beck, Plaintiff.

(Endorsed:) Filed and entered June 30, 1898. Geo. W. Sproule, clerk.

123 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, } ss:
District of Montana, }

I, Geo. W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable, the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of 135 pages, numbered consecutively from 1 to 135, is a true and correct transcript of the pleadings, process, records, orders, judgment, and all proceedings had in said cause and of the whole thereof, as appear- from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amounts to the sum of $46.15, and has been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States circuit court at Helena, in said district of Montana, this 6th day of August, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-third.

[SEAL.] GEO. W. SPROULE, *Clerk.*

124 (Endorsed:) No. 468. In the United States circuit court of appeals for the ninth circuit. The Supreme Lodge, Knights of Pythias of the World, plaintiff in error, *vs.* Lillian H. Beck, defendant in error. Transcript of record. In error to the circuit

court of the United States for the district of Montana. Filed August 13th, 1898. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk. Docket fee paid and cause docketed August 26, 1898. F. D. Monckton, clerk.

125 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Friday, the tenth day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD,
vs.
LILLIAN H. BECK. } No. 468.

Ordered cause argued by Albert I. Loeb, Esquire, counsel for plaintiff in error, and C. B. Nolan, Esquire, counsel for defendant in error, and submitted to the court for consideration and decision.

126 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SUPREME LODGE OF KNIGHTS OF PYTHIAS of the World, Plaintiff in Error,
vs.
LILLIAN H. BECK, Defendant in Error. } No. 468. Filed May 16, 1899.

Evidence—Shifting burden of proof.—Where a defendant in an action on a policy of life insurance pleads as a defense that the insured committed suicide, by reason of which the policy became void, the burden of establishing such defense rests upon the defendant throughout the trial. The fact that the plaintiff introduces in evidence the proofs of death furnished the defendant, containing the statement that the insured committed suicide and the verdict of a coroner's jury to that effect, while such evidence is entitled to its weight, and, standing alone, would establish the fact of suicide *prima facie*, does not shift the burden of proof on the issue, so as to require the plaintiff on the whole case to prove, by a preponderance of evidence, that death resulted from other causes.

In error to the circuit court of the United States for the district of Montana.

Albert I. Loeb, for plaintiff in error.
C. B. Nolan, for defendant in error.

Before Gilbert, Ross, and Morrow, circuit judges.

127 *Opinion.*

Ross, *Circuit Judge:*

On the 1st day of April, 1895, one Frank E. Beck made application for membership in the Endowment rank, Knights of Pythias,

which is the insurance branch of that society's business. The application was accepted. The applicant's wife, Lillian H. Beck, the defendant in error here, was named as beneficiary. The by-laws of the society pertinent to the present case provide:

"If the death of any member of the Endowment rank heretofore admitted into the first, second, third, or fourth class, or hereafter admitted, shall result from suicide, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel, or at the hand of justice, or violation or attempted violation of any criminal law, then the amount to be paid upon such member's certificate shall be a sum only in proportion to the whole amount as the matured life expectancy is to the entire expectancy at date of admission to the Endowment rank; the expectation of life based upon the American experience table of mortality in force at the time of such death to govern."

On the night of the 31st day of October, 1896, by the discharge of a double-barreled shotgun, which Beck at the time carried, he was killed. A coroner's inquest was held, and the verdict declared that the insured "came to his death, on the 31st of October, 1896, by shooting himself in the head with a double-barreled shotgun, with the purpose and intent of committing suicide, while temporarily insane, due probably to the use of intoxicants; that he threatened to kill his wife before killing himself." Pursuant to the by-laws of the society, proofs of death were presented to it, which were signed and sworn to by the beneficiary, in which the statement was made that the death of the insured was caused by suicide. Annexed to the proofs was a copy of the coroner's verdict, together with a certified copy of
128 the testimony upon which it was based. In due time, after the presentation of the proofs of death, a tender of $138 was made by the society, which was refused, and thereafter the present suit was commenced against the plaintiff in error to recover the sum of $3,000, which was the amount of the insurance. While the complaint alleges that the plaintiff furnished the defendant with proof of the death of the insured, it contains no mention of the manner of his death. In defense of the action, the defendant alleges "that the death of said Beck resulted from self-destruction, and that he committed suicide; that prior to said Beck taking his own life, said Beck was attempting to violate, and did violate, the criminal laws of the State of Montana." The answer made a tender to the plaintiff of $138, and asked that the defendant be dismissed with its costs. The case came on for trial before the court with a jury, and resulted in a verdict for the plaintiff in the sum of $3,000.

It is first claimed on behalf of the plaintiff in error that there is no evidence to sustain the verdict; in other words that the court should have directed a verdict for the defendant. A careful examination of the evidence and consideration of the circumstances surrounding the killing satisfies us that the trial court would not have been justified in doing so, but that it was a case proper to be submitted to the jury, under appropriate instructions.

Complaint is next made of instructions given and refused, the substance of which complaint is that because, in the proofs of death presented by the beneficiary, which were introduced in evidence by the plaintiff, were the verdict of the coroner's jury and the statement of the beneficiary to the effect that the deceased committed suicide, the burden which theretofore rested on the defendant to prove that fact, which it alleged, as a defense, was thereby shifted, and that it then became incumbent upon the plaintiff to show, by a preponderance of evidence, that the death of the deceased was from
129 accident or natural causes. Undoubtedly the preliminary proofs furnished the defendant by the plaintiff, and introduced in evidence by her, constituted *prima facie* proof that the deceased committed suicide, and, standing alone, would have defeated any recovery on her part. But they were of such a nature as that, since it was not made to appear that the insurer was prejudiced in its defense by relying upon the representations contained in the proofs, it was open to the plaintiff to show by other proof, or by the facts and circumstances of the case, that those representations were made, under a misapprehension of the true facts, or in ignorance of material matters subsequently ascertained. Insurance Co. *v.* Newton, 22 Wall., 32; Hanna *v.* Insurance Co., 150 N. Y., 526; 44 N. E., 1099; Walther *v.* Insurance Co., 65 Cal., 417; 4 Pac., 413. In all cases where such showing is satisfactory, such an admission is overcome. The burden of proof and the weight of evidence are, as said by the supreme court of Massachusetts in Bridge Co. *v.* Butler, 2 Gray, 132, "two very different things. The former remains on a party affirming a fact, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the strength and nature of the proofs offered in support or denial of the main fact to be established." In Heinemann *v.* Heard, 62 N. Y., 455, the court of appeals of New York said:

"During the progress of a trial, it often happens that a party gives evidence tending to establish his allegation—sufficient, it may be, to establish it *prima facie*—and it is sometimes said that the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the *prima facie* case, or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial."

See, also, Spencer *v.* Association, 142 N. Y., 509; 37 N. E., 625; Scott *v.* Wood, 81 Cal., 398; 22 Pac., 871; Clark *v.* Hills, 67
130 Tex., 141; 2 S. W., 356; Powers *v.* Russell, 13 Pick., 76; Tarbox *v.* Steamboat Co., 50 Me., 345; Nibl. Ben. Soc. & Acc. Ins., § 336.

We are of opinion that the burden assumed by the defendant, in its answer, of proving that the deceased came to his death with suicidal intent, remained on the defendant, and that it did not devolve upon the plaintiff to prove, by a preponderance of evidence, that his death resulted from the accidental discharge of the gun.

It is further claimed on the part of the plaintiff in error that the court should have directed the jury to return a verdict for the de-

fendant, on the ground that the death of the deceased should be treated as one "in violation or attempted violation of the criminal law." There are two answers to this point, either one of which is sufficient: First, the allegation of the answer is not that Beck's death resulted from the violation or attempted violation of any criminal law of the State of Montana, but only that at some indefinite time, "prior to said Beck taking his own life, said Beck was attempting and did violate the criminal law of the State of Montana." In the next place, while the evidence showed that, very shortly prior to the time that he was killed, he was engaged in unlawful acts, it did not show with sufficient clearness that he was so engaged at the time he met his death as to justify the court in taking the case from the jury. The judgment is affirmed.

131 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1898.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Plaintiff in Error,
vs.
LILLIAN H. BECK, Defendant in Error. } No. 468.

In error to the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

(Endorsed:) Judgment. Filed May 16, 1899. F. D. Monckton, clerk.

132 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Plaintiff in Error,
vs.
LILLIAN H. BECK, Defendant in Error. } No. 468.

It is hereby stipulated and agreed by and between the parties hereto, acting by and through their counsel and attorneys, that for the period of thirty days pending the determination of the question of issuing out a writ of error from the Supreme Court of the United States in the above-entitled action *that* the mandate or remittitur shall be held by the circuit court of appeals and not forwarded to the clerk of the circuit court of the United States for the district of

Montana, and that all proceedings herein be stayed for a period of thirty days from the date hereof.

Helena, Montana, May 24, 1899.

ALBERT I. LOEB,
Attorney for Plaintiff in Error.
C. B. NOLAN,
Attorney for Defendant in Error.

(Endorsed:) Stipulation staying issuance of mandate. Filed May 29, 1899. F. D. Monckton, clerk.

133 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Plaintiff in Error,
vs.
LILLIAN H. BECK, Defendant in Error.

And now comes The Supreme Lodge, Knights of Pythias, plaintiff in error herein, and says that on the — day of ——, 1899, this court entered judgment herein in favor of the defendant in error and in affirmance of the judgment of the circuit court of the United States, ninth circuit, district of Montana, in which judgment and proceedings had thereunto in this cause, both in the circuit court of the United States, ninth circuit, district of Montana, and in the United States circuit court of appeals for the ninth circuit, certain errors were committed to the prejudice of the plaintiff in error, The Supreme Lodge, Knights of Pythias, a corporation created by and existing under an act of Congress of May 5, 1870, relating to corporations in the District of Columbia, and reincorporated under the act of Congress of June 29, 1894, entitled "An act to incorporate the Supreme Lodge, Knights of Pythias," all of which will more in detail appear from the assignment of errors, which is filed with this petition; and your petitioner avers that manifest error hath happened in the proceedings and in the affirmance and rendition of judgment in the said cause by the United States circuit court of appeals for the ninth circuit, to the great injury and damage of your petitioner, which will more specifically appear from the record herewith presented and from the assignment of errors, which is filed with

134 this petition.

Wherefore this plaintiff in error, The Supreme Lodge, Knights of Pythias, prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the records, proceedings, and papers in this cause, duly authenticated, showing the proceedings therein in the circuit court of the United States, ninth circuit, district of Montana, and in the United States circuit court of appeals for the ninth circuit, may be sent to the Supreme Court of the United States, and that the error may be duly corrected and full and speedy justice done your petitioner; and your petitioner also

prays for a supersedeas and stay of proceedings herein: and your petitioner, in duty bound, will ever pray.

ALBERT I. LOEB,
Attorney for the Plaintiff in Error, The Supreme Lodge, Knights of Pythias.

Let the writ of error issue as herein prayed, and also let the supersedeas and stay of proceedings be granted, as in said petition prayed for.

WILLIAM B. GILBERT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Petition for writ of error and order allowing writ, etc. Filed September 20, 1899. F. D. Monckton, clerk.

135 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Plaintiff in Error,
vs.
LILLIAN H. BECK, Defendant in Error.

Assignment of Errors.

The Supreme Lodge, Knights of Pythias, plaintiff in error in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the case, to wit:

I.

The court erred in overruling and denying the motion of the defendant, made at the close of the evidence in the case, to instruct the jury to bring in a verdict for the defendant.

II.

The court erred in sustaining plaintiff's objection to the testimony offered by the defendant as to the character of the guns carried in stock by the witness Doughty, and to the effect that said witness had in his possession several lengths of guns called the Belgian gun, some long barrels and some short barrels, and that so far as the recollection of the witness is concerned he does not know whether it was a long or short barreled gun that was borrowed by Mr. Beck.

136 III.

The court erred in sustaining plaintiff's objection to the testimony offered by the defendant by the witness Reece as to what were the indications as to the manner of the death of Frank E. Beck, as to indicating suicide or otherwise.

IV.

The court erred in overruling defendant's objection and permitting the witness O. G. Beck to use in illustration the long-barrel gun, as there was no evidence that there was used in the killing of Beck any particular gun, and especially no evidence that the gun used in illustration did the killing.

V.

The court erred in sustaining plaintiff's objection in objecting to allowing, and in refusing to allow, the witness Linder to jar the stock of the gun on the floor with the hammers raised to see whether it would go off from a jar.

VI.

The court erred in overruling the objection of the defendant to the testimony offered by Lillian Beck as to her physical condition.

VII.

The court erred in sustaining the objection of the plaintiff to the defendant asking the question of the plaintiff: "When did it first occur to you that Mr. Beck might have died by accident?"

VIII.

The court erred in sustaining the plaintiff's objection and not permitting the defendant to ask the plaintiff the following
137 question: "Is it not a fact, Mrs. Beck, that you have stated to a great number of persons in speaking about this case that there was no question but that Mr. Beck committed suicide, but the company couldn't prove it?"

IX.

The court erred in refusing to give the following instructions tendered by the defendant, to wit: "In an action on a life-insurance policy, if there be doubt whether the death of the assured was the result of accident or suicide, the doubt should be solved in favor of the theory of accident; but if the plaintiff has in her proofs of death stated that the death was by suicide, it is incumbent upon her to satisfy the jury that she was mistaken in this statement and the death was caused by accident, and unless she has done so by a preponderance of the testimony, you will find for the defendant."

X.

The court erred in refusing to give the following instruction tendered by the defendant: "The jury are further instructed that there is no presumption that the assured died from natural causes, and not from suicide, but this matter must be determined by you upon the preponderance of evidence with regard to the party having the burden of proof. But since the introduction into this case of the proof of loss furnished by the plaintiff to defendant company, there is a presumption that he died from suicide, and unless the plaintiff

has, by a preponderance of evidence proven that Frank E. Beck died from accidental causes, you will find for the defendant."

138 XI.

The court erred in refusing to give the following instruction tendered by the defendant: "The jury are further instructed that in civil causes of this nature the law requires the party having what is called the burden of proof resting on him to prove his case by a preponderance of the evidence, and if he fails so to do, then it is the duty of the jury to return a verdict for the other party. In the case now on trial the burden of proving that Frank E. Beck came to his death by suicide was upon the defendant company; up to the time that it appeared in this case by the testimony offered that the plaintiff, Lillian H. Beck, in her proofs of death furnished to the defendant, stated under oath that the death of Frank E. Beck the assured, resulted from suicide from that instant the burden of proof shifted to the plaintiff, and before you can find a verdict in her favor, you must be satisfied that a preponderance of all the evidence in this case tends to prove that Frank E. Beck died from an accident, and unless you so believe, you should return your verdict for the defendant; that is, the plaintiff must prove by a preponderance of evidence that the said Frank E. Beck's death resulted from an accident, and unless she has done so, you will find for the defendant."

XII.

The court erred in refusing to give the following instruction tendered by the defendant: "Gentlemen of the jury, you will notice that in the proofs of death made and furnished to the defendant by the beneficiary, Lillian H. Beck, the plaintiff herein, under
139 the policy or certificate upon which this suit is brought it is stated under oath that the death of Frank E. Beck resulted from suicide. Under the law, this throws the burden of proof on the plaintiff to show that the statements in the proofs of loss as to the manner of the death of Frank E. Beck were made by mistake, or under a misapprehension of the facts, and unless the statements made by her in the said proofs of loss so furnished to the said defendant as to the manner of the death of Frank E. Beck are overcome by proof adduced by her, showing that her husband came to his death by accident, or from some other causes other than suicide, the proofs so furnished stand as conclusive evidence of the cause of death of the said Frank E. Beck, and you will find that he committed suicide in accordance therewith, and your verdict must be for the defendant."

XIII.

The court erred in refusing to give the following instruction tendered by the defendant: "The jury are instructed that, as a matter of law governing cases of this character, it is held that representations made in the proofs of death as to the manner of death of the assured are intended for the action of the insurance company, and

upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made under a misapprehension of the facts or in ignorance of material matters subsequently ascertained. The burden put upon the plaintiff by
140 the representation of suicide makes the case one where she must show that her husband did not purposely kill himself."

XIV.

The court erred in refusing to give the following instruction tendered by the defendant: "That if the jury find that Frank E. Beck's death occurred while violating the criminal laws of the State of Montana, or while in an attempt at the violation thereof, no matter what they believe was the cause of death, suicide or accident, the plaintiff cannot recover under this policy and you will find a verdict for the defendant."

XV.

The court erred in refusing to give the following instruction tendered by the defendant: "You are further instructed that in coming to a verdict in this case you will take into consideration the conflicting statements herein, and in believing the one and disregarding the other, *they* will look to the interest of the parties who make the same; in the event of this action, if different statements are made at different times, you are at liberty to believe the one and disregard the other. By the introduction of the proofs of loss delivered by plaintiff to the defendant, the presumption is that Frank E. Beck committed suicide, and unless the plaintiff has introduced testimony to prove accidental death by a preponderance of evidence, you will find for the defendant."

XVI.

The court erred in refusing to give the following instruction
141 tendered by the defendant: "If Beck died while attempting to or while violating the criminal laws of the State, plaintiff has no claim under the contract between Frank E. Beck and the defendant that would entitle her to a verdict, and you are instructed if you find he was attempting to violate, or was violating the criminal laws of this State at the time of his death, the plaintiff cannot recover, and you will find for the defendant."

XVII.

The court erred in giving the following part of the charge as given: "The defendant has offered in evidence the proofs of death of Frank E. Beck, and has also offered in evidence the testimony of the witnesses at the coroner's inquest, and the verdict of the coroner's jury. This evidence, under the law, it is proper for you to consider, but you are instructed that it is not conclusive upon the plaintiff nor is the plaintiff estopped from showing a condition different from that suggested by such proofs of death or verdict."

XVIII.

The court erred in giving the following part of the charge as given: "You are instructed that in considering this evidence you must do so in the light of the explanations made by the plaintiff, and in this connection you are at liberty—nay more, it is your duty to consider whether or not the conclusion set forth is warranted by the evidence upon which such conclusion is based, for after all it is for you to say whether or not upon the evidence plaintiff was justified in saying that the death was intentional, rather than accidental, and so likewise is it your duty to say whether the coroner's jury, on the evi-
142 dence before it, could consistently find that the death was suicidal, rather than accidental. In considering this feature of the case, it is not only your duty to consider the verdict of the coroner's jury, but also to consider the evidence which was adduced before that coroner's jury. So likewise it is your duty not merely to consider the proofs of death furnished to the company, but it is your duty to consider the circumstances surrounding the presentation of such proofs and the evidence which the plaintiff had respecting the question as to whether the death of Frank E. Beck was accidental or intentional at the time she signed those proofs of death, and in this connection it is proper for you to consider as to where she was at the time the gun was discharged, and whether she could see her husband at that particular time, and if upon the whole evidence, with explanations offered as to how those proofs came to be submitted, and considering all of the evidence in the case now before you, you are not satisfied by a preponderance of the evidence that Frank E. Beck did kill himself intentionally, then I tell you that under those circumstances the plaintiff is entitled to a verdict, and your verdict should be so declared."

XIX.

The court erred in giving the following part of the charge as given: "I have already told you that the law presumes that the death was accidental. This presumption arises from the fact that it is the general experience of mankind that people do not take their own lives; that the love of life is so strong in the human breast the law presumes that no act will be done by the person to
143 abridge the period of his existence, and this presumption of law dispenses with the necessity of evidence that the death was not intentional on the part of the plaintiff. Before the defendant is entitled to a verdict, this presumption must be overcome by a preponderance of the evidence. That is to say, the evidence must show you that notwithstanding this presumption the death of Frank E. Beck in this instance was occasioned by an intentional act of his, whether sane or insane, and unless you find that this was so, that he intentionally discharged the gun for the purpose of taking his life, you must find for the plaintiff."

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XX.

The court erred in giving the following part of the charge as given: "Again, if upon the consideration of all the evidence you cannot say with any degree of certainty as to how he met his death—that is to say, you cannot tell whether he intentionally discharged the gun with the purpose of killing himself, or whether it was accidentally discharged in some way or other, this likewise would be a case where the plaintiff would be entitled to a verdict; for, as I have told you, the burden is upon the defendant company to show that the discharge of the gun was intentional for the purpose of terminating the life of Mr. Beck."

XXI.

The court erred in giving the following part of the charge as given: "The declaration of the plaintiff in her statement as to the cause of the death of her husband, Frank E. Beck, has been
144 admitted in evidence in this case. This admission or declaration was to the effect that said Beck had committed suicide while insane. If this admission was not overcome or counterbalanced by other evidence in the cause, this admission would warrant you in finding that the deceased, Beck, came to his death as in the statement set forth. If, however, the evidence shows that plaintiff made this declaration from what she heard from others, and from no adequate knowledge on her part of the cause of her husband's death, then you are at liberty to disregard this declaration, and if there is no other evidence tending to show that the said Beck committed suicide, and you find that you should disregard this declaration, then you would not be justified in finding that said Beck did commit suicide. I would not say to you that there is no evidence bearing upon the question as to whether the said Beck committed suicide but this declaration. The evidence as to the cause of said Beck's death given before the coroner's jury was made a part of plaintiff's statement; it is for you to say whether or not this evidence would justify said jury in finding the verdict rendered by it, and the admission of plaintiff. Suicide may be proven by circumstances. The question, then, is presented to you as to whether the evidence is sufficient to find that said Beck did commit suicide."

XXII.

The court erred in giving the following part of the charge as given: "The investigation narrows itself down to the question as to whether the death of Frank E. Beck was an act of suicide, whether voluntary or involuntary, while sane or insane, or whether it was accidental."

145 XXIII.

The court erred in giving the following portion of the charge as given: "The plaintiff has exhibited the policy in evidence, and has given evidence of the fact that the insured died, and it being admitted that the assured was in good standing at the time of his

death, this makes a *prima facie* case for the plaintiff, which has to be overcome by the defendant."

XXIV.

The court erred in giving the following charge as given: "It is manifest that self-destruction cannot be presumed. So strong is the instinctive love for life in the human breast, so uniform the efforts of men to preserve their existence, that suicide cannot be presumed. The plaintiff is therefore entitled to recover, unless the defendant has by competent evidence overcome this presumption and satisfied you by a preponderance of the evidence that the injuries which caused the death of the insured were intentional on his part."

XXV.

The court erred in giving the following part of the charge as given: "The burden of proving this allegation by a preponderance of the evidence rests on the defendant. The presumption is that the death was not voluntary, and the defendant, in order to sustain the issues of suicide on its part, must overcome this presumption, and satisfy the jury that the death was intentional; that is to say, the law presumes in this case that the death was accidental
146 and not intentional in the absence of any evidence and without any proof being adduced either way as to the circumstances attendant upon the death, the plaintiff would be entitled to recover. Before that right to recover is defeated, the defendant is required to satisfy you by evidence in this case that the death was intentional, in other words, that the insured committed suicide, and unless this has been done by a preponderance of the evidence, so as to overcome the legal presumption that the death was not intentional, your verdict should be for the plaintiff."

XXVI.

The court erred in giving the following part of the charge as given: "The defendant contends that the insured committed suicide. The burden of proving this fact devolves upon it, and unless you are satisfied by a preponderance of the evidence that death was occasioned by suicide, your verdict must be for the plaintiff."

XXVII.

The court erred in giving the following part of the charge as given: "You are the judges of the credibility of the witnesses, and you are also the judges of the facts in this case, and it is for you to say from all the evidence introduced, and the circumstances concerning this case, whether it is not just as likely that the gun in question was not accidentally discharged as that it was intentionally discharged; and unless the defendant has satisfied you by a preponderance of the evidence that the gun in question was intentionally discharged, your verdict should be for the plaintiff, for, as already explained

to you, the law presumes that the gun was accidentally dis-
147 charged, and it is only when proof is adduced, or the circumstances are of such a character as to overcome this presumption, that you are justified in finding a verdict for the defendant."

XXVIII.

The court erred in giving the following part of the charge as given: "You are further instructed in this connection, that if upon consideration of all the facts in the case, and likewise taking into consideration all of the circumstances, including the presumption of law that I have called your attention to, your minds are in such a condition that you are uncertain whether death was accidental or whether it was intentional, in this event the defendant would have failed to have made out its case by a preponderance of the evidence, and the plaintiff would be entitled to a verdict."

XXIX.

The court erred in giving the following part of the charge as given: "Here is an instruction asked, which I refused, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed, he cannot recover. But if a man, contemplating that he was going to kill his
wife if she didn't go home with him, but was not in the act
148 and doing that at the time he was killed, that clause of the policy does not apply."

XXX.

The court erred in giving the following part of the charge as given: "It has been stated here in the argument, and I told Mr. Loeb I would not give it, that when there is this admission on the part of the plaintiff that death was occasioned by suicide, that then the burden of proof is shifted, and it was necessary for the plaintiff to show that it was accidental. If the proofs overcome this admission and showed that it was not correct—that it was wrong—why, then, it should not control your action. In no case that I know of is such a rule maintained, unless by some decisions in regard to insurance companies. A man may admit something from a lack of knowledge upon the subject, but if it turns out afterwards that he was misinformed, that he had not any adequate knowledge upon the subject, that admission may be disregarded, and should be disregarded. A man is only estopped from denying his admissions and declarations when it would work a fraud upon the other party, and there is no claim in this case—no claim that it would work a fraud upon the defendant in this respect."

XXXI.

The court erred in giving the following part of the charge as given: "There is only evidence before you that he was killed by a gun discharged through his head, and whether that was done with the intent by himself to commit suicide is for you to determine. If you are unable to determine that fact, then you should find for the plaintiff, because the presumption is that he didn't do it intentionally."

149 XXXII.

Error in the court of appeals in giving judgment affirming the judgment of the circuit court.

ALBERT I. LOEB,
Attorney for the Defendant and Plaintiff in Error,
The Supreme Lodge, Knights of Pythias.

(Endorsed:) Assignment of errors. Filed September 20, 1899. F. D. Monckton, clerk.

150 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Plaintiff in Error,
vs.
LILLIAN H. BECK, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents that we, the Supreme Lodge, Knights of Pythias, a corporation created by and existing under an act of Congress of May 5th, 1870, relating to corporations in the District of Columbia, and reincorporated under the act of Congress of June 29th, 1894, entitled "An act to incorporate the Supreme Lodge, Knights of Pythias," as principal, and the National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto the above-named Lillian H. Beck in the full and just sum of six thousand five hundred dollars ($6,500.00), to be paid to the said Lillian H. Beck, her certain attorney, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this thirty-first day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at San Francisco, in the State of California, in a suit depending in the circuit court of appeals between The
151 Supreme Lodge, Knights of Pythias, as plaintiff in error, and Lillian H. Beck, as defendant in error, judgment was rendered against the said Supreme Lodge, Knights of Pythias;

And whereas the said Supreme Lodge, Knights of Pythias, has prosecuted a writ of error in the Supreme Court of the United States

to reverse the judgment aforesaid, and a citation having issued, directed to the said Lillian H. Beck, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the foregoing obligation is such that if the said Supreme Lodge, Knights of Pythias, shall prosecute its writ of error to effect and answer all damages, interest, and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
By JOHN A. HINSEY,
President Board of Control.

[SEAL.]

Attest: H. B. STOLTE,
Secretary Board of Control.

NATIONAL SURETY COMPANY.
ADAMS A. GOODRICH,
Resident Vice-President.
GEO. H. BLISS,
Resident Assistant Secretary. [SEAL.]

Signed, sealed, and delivered in presence of—
T. J. LONG.
W. D. MILLARD.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, W. D. Millard, a notary public of said county and State, do certify that the foregoing bond was duly executed for and in behalf of the Supreme Lodge, Knights of Pythias, by J. A. Hinsey and
152 H. B. Stolte, president and secretary respectively of the board of control, Endowment rank, Knights of Pythias, and that the seal attached thereto is the seal of said board of control, and was affixed by authority of said Supreme Lodge, Knights of Pythias, and said board of control, and that said officers have authority to sign the name of said Supreme Lodge, Knights of Pythias, and to execute said bond and affix said seal.

Witness my hand and notarial seal this 31st day of August, 1899.

[SEAL.]
W. D. MILLARD,
Notary Public, Cook County, Illinois.

The foregoing bond, as to the amount and sufficiency of surety thereof, approved September 20, 1899.

WM. B. GILBERT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Affidavit, Acknowledgment, and Justification by Guaranty or Surety Company.

STATE OF ILLINOIS, }
County of Cook, } ss :

On this 31st day of August, one thousand eight hundred and ninety-nine, before me personally came Geo. H. Bliss, known to me to be the res. ass't sec'y of the National Surety Company, the corporation described in and which executed the within and foregoing bond of the Supreme Lodge, Knights of Pythias, as a surety t' ereon, and who, being by me duly sworn, did depose and say that he resides in the city of Chicago, State of Illinois; that he is the
153 res. ass't sec'y of said company and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the act of Congress of August 13, 1894; that the seal affixed to the within bond of the Supreme Lodge, Knights of Pythias, is the corporate seal of said company, and was thereto affixed by order and authority of the board of directors of said company, and that he signed his name thereto by like order and authority as res. ass't sec'y of said company, and that he is acquainted with Adams A. Goodrich and knows him to be the res. vice-pres. of said company, and that the signature of said Adams A. Goodrich subscribed to said bond is in the genuine handwriting of said Adams A. Goodrich, and was thereto subscribed by order and authority of said board of directors and in the presence of said deponent, and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever by more than the sum of one million dollars.

—— —— is our agent to acknowledge service in the judicial district wherein this bond is given.

GEO. H. BLISS.

Sworn to, acknowledged before me, and subscribed in my presence this 31st day of August, 1899.

[SEAL.] JOHN C. BANKS,
Notary Public.

154 *Financial Exhibit of the National Surety Company of New York as of March 31st, 1899.*

Assets.

U. S. Government bonds	$66,450.00
New York city bonds	811,770.00
Brooklyn city bonds	71,075.00
A., T. & S. F. R'y Co. bonds	81,625.00
Mortgage loans (first liens)	44,775.00
Advance on contracts guaranteed, secured by mortgages and cash payments assigned to the company..	97,706.24

Cash in banks	86,272.50
Net premiums in course of transmission	98,522.86
Accrued interest on investments	12,941.22
	$1,371,137.82

Liabilities.

Capital	$500,000.00
Claims in process of adjustment	27,591.04
Special reserve for contingent claims under reinsurance contract	21,000.00
Trust funds and all other liabilities	47,267.12
Reinsurance reserve as required by law	241,619.83
Net surplus	533,659.83
	$1,371,137.82

STATE OF ILLINOIS, } ss:
County of Cook, }

Geo. H. Bliss, of Chicago, Ill., being duly sworn, deposes and says that he is resident assistant secretary of the National Surety Company of New York, and that the above and foregoing is a full, true, and correct statement of the financial condition of said company on the thirty-first day of March, A. D. 1899, as the same remains on file in the office of the Attorney General of the United States.

GEO. H. BLISS.

Subscribed in my presence and sworn to before me this 31st day of August, A. D. 1899.

[SEAL.] JOHN C. BANKS,
Notary Public.

155 (Endorsed:) Bond on writ of error. Filed September 20, 1899. F. D. Monckton, clerk.

156 United States Circuit Court of Appeals for the Ninth Circuit.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Plaintiff in Error,
v.
LILLIAN H. BECK, Defendant in Error.

No. 468. Clerk's Office. Præcipe.

To the clerk of said court.

SIR: Please issue and seal writ of error in the above-entitled cause, returnable in the Supreme Court of the United States within sixty days from the date of such writ, and prepare transcript of record on the return thereto, consisting of printed record on file in your office, as well as of copies of the order of submission, opinion, and judgment of the circuit court of appeals, stipulation staying mandate,

petition for and order allowing writ of error to Supreme Court, assignment of errors, and bond on writ of error.

ALBERT I. LOEB,
Attorney for Plaintiff in Error.

(Endorsed:) Precipe for writ of error, transcript, etc. Filed Oct. 21st, 1899. F. D. Monckton, clerk.

157 United States Circuit Court of Appeals for the Ninth Circuit.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, Plaintiff in Error,
v.
LILLIAN H. BECK, Defendant in Error.
No. 468.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and fifty-six (156) pages, numbered from one (1) to one hundred and fifty-six (156), inclusive, to be a full, true, and correct copy of the printed transcript of record, the order of submission, the opinion, the judgment, the stipulation staying mandate, the petition for and order allowing writ of error, the assignment of errors, the bond on writ of error, and the precipe for issuance of writ of error in the above-entitled cause as the originals thereof remain and appear of record in my office, and that the same together constitute the return *the* the annexed writ of error as ordered and approved by counsel for the plaintiff in error.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 25th day of October, A. D. 1899.

Seal United States Circuit Court of Appeals, Ninth Circuit.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. postage stamp, canceled Oct. 25, '99. F. D. M. I. R.]

158 UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit. Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, in a cause between The Supreme Lodge, Knights of Pythias of the World, plaintiff in error, and Lillian H. Beck, defendant in error, No. 468, a manifest error hath happened, to the great damage of the said Supreme Lodge, Knights of Pythias of the World, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this

writ, so that you have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 27th day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

{Seal United States Circuit Court of Appeals, Ninth Circuit.}

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by—
WILLIAM B. GILBERT,
Senior United States Circuit Judge for the Ninth Judicial Circuit.

{Seal United States Circuit Court, District of Montana.}

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States, Ninth Circuit, District of Montana.

159 [Endorsed:] D. No. 468. U. S. circuit court of appeals for the ninth circuit. The Supreme Lodge, Knights of Pythias of the World, plaintiff in error, *vs.* Lillian H. Beck, defendant in error. Writ of error. Filed October 21, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Service of a copy of the within writ of error admitted this 17th day of October, 1899, at Helena, Montana.

C. B. NOLAN,
Attorney for Plaintiff, Lillian H. Beck.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said circuit court of appeals, to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

{Seal United States Circuit Court of Appeals, Ninth Circuit.}

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled Oct. 25, 1899. F. D. M.]

160 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to Lillian H. Beck, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error duly issued out of the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Supreme Lodge, Knights of Pythias of the World, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States circuit judge for the ninth judicial district, this 27th day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

WILLIAM B. GILBERT,
United States Circuit Judge for the Ninth Judicial Circuit.

161 Service of a copy of the within citation admitted this 17th day of October, 1899, at Helena, Montana.

C. B. NOLAN.
Attorney for Plaintiff, Lillian H. Beck.

[Endorsed:] D. No. 468. U. S. circuit court of appeals for the ninth circuit. The Supreme Lodge, Knights of Pythias of the World, plaintiff in error, *vs.* Lillian H. Beck, defendant in error. Citation. Filed October 21, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Endorsed on cover: File No., 17,625. U. S. C. C. of appeals, 9th circuit. Term No., 194. The Supreme Lodge, Knights of Pythias of the World, plaintiff in error, *vs.* Lillian H. Beck. Filed January 30, 1900.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 194.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, *Plaintiff in Error,* vs. **LILLIAN H. BECK,** *Defendant in Error.*	In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for Plaintiff in Error.

This is an action on a certificate of life insurance for $3,000, issued by the plaintiff in error to Frank E. Beck, in favor of defendant in error, his wife. The action was commenced in the District Court of Montana. The complaint was amended by stipulation so as to recite that the defendant "is a corporation incorporated under the act of Congress of "May 5th, 1870, relating to corporations in the District "of Columbia, and reincorporated under the act of Congress "of June 29th, 1894, entitled 'an Act to incorporate the "Supreme Lodge, Knights of Pythias.'" (Rec., 5.)

The plaintiff in error is a fraternal and benevolent society.

The action was begun on the 13th day of April, 1897, and on the 29th day of October, 1897, was removed to the Circuit Court of the United States for the Ninth Circuit, where a trial was had before Hon. Hiram Knowles and a jury, and

a verdict was returned for the plaintiff for three thousand dollars, the full amount of the certificate. (Rec., 10.) Judgment was entered on said verdict on the 19th day of May, 1898. At the close of all the evidence the defendant, by its counsel, moved the court to direct the jury to return a verdict for the defendant. (Rec., 46.) This motion was overruled, to which action of the court the defendant excepted. (Rec., 48.) A bill of exceptions and demurrer to the evidence was allowed on the 7th of June, 1898. (Rec., 54.) Assignments of error were filed on the 29th day of June, 1898, and a writ of error issued on the same day (Rec., 63), to the United States Circuit Court of Appeals for the Ninth Circuit.

That court, on the 16th day of May, 1899, rendered an opinion affirming the judgment of the trial court. (Rec., 67.) A writ of error was allowed on the 20th day of September, 1899, to this court, and on the same day assignments of error were filed. (Rec., 80.)

The ground of federal jurisdiction on which removal was obtained is the incorporation of the defendant under act of Congress.

The defenses set up by the answer were (1) suicide, (2) death caused or superinduced by violation or attempted violation of law, these being excepted risks under the by-laws of the defendant. (Rec., 7.) The defendant acknowledged that under its by-laws the beneficiary was entitled to receive on the policy $138, in case the death of the assured were due to suicide, averred that that amount had been tendered to the beneficiary and paid the same into court on filing its answer. (Rec., 8.)

The certificate of life insurance on which this action is founded was issued by the plaintiff in error on April 16,1895, to Frank E. Beck, in favor of defendant in error, his wife.

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The insured died on the 31st of October, 1896, at Helena, Montana, where he was engaged in the laundry business. At the time of his death, the insured was 35 years of age (Rec., 13), and had been married to the defendant in error about five years, and had one child—a little girl. (Rec., 41.) His death occurred on Saturday, at about 8 o'clock in the evening, from the discharge of a shotgun, which he had taken with him to the house of a friend of the family, with whom his wife had taken refuge, in consequence of a quarrel with the deceased two or three days before, in the course of which he had threatened to kill her. The uncontradicted evidence establishes that the deceased had gone to the house in pursuit of his wife, and was making his third attempt within two hours, to either get into the house, or to compel his wife to come out of it, when he met his death.

At an inquest held on the following Sunday, the plaintiff testified (Rec., 19), that the deceased had been drinking heavily during the past two years; that he had threatened several times to take her life; that he was always drinking when he made these threats; that she had frequently to go out at night to get a physician to quiet him; that on the Wednesday preceding his death, he came home in the afternoon and slept till about 6 o'clock; that after eating his supper he went downtown and came home after 12 o'clock and was "quite drunk"; that he commenced to sharpen a carving knife and was doing so for about an hour; that he came into the room of the witness to take the child from her, seizing the witness by the wrist, and that, on the child refusing to go with him, he went to another room, slammed the door, and went to bed. Before retiring he hid the knife, and the servant had some difficulty in finding it. On the following day, which was the Thursday before his death, while the plaintiff was returning to the house with the de-

ceased, she urged him to stop drinking, and said, that she would not live with him if he did not, to which he replied, "You have got to, or I will kill you." She went to his office with him and tried to make her escape while he was in the back part of it, but he watched her and followed her home. On the next day she left the house for a time and on her way home she saw him on the street "staggering drunk." Seeking to avoid him, she turned onto another street, and she met her servant girl, who said, "Mrs. "Beck, don't go home; he has got the gun and will "kill you." From the testimony of this girl given on the trial (Rec., 33), it seems that she had, by direction of Mrs. Beck, hid Beck's guns, of which he owned three, because of his threats against his wife's life. Mrs. Beck then took the child and went to a friend's house (Rec., 19 and 41), where she remained until the afternoon of Saturday, but left there because the deceased had discovered where she was, and went to the house of another friend, Mrs. Nolan. This lady, was the wife of the lawyer who represented Mrs. Beck in the trial of this action, but who unfortunately was absent from the city at the time of the occurrences here in evidence; and Mrs. Beck and Mrs. Nolan were alone on the premises when Beck made his first visit to the house, about six o'clock in the afternoon. Earlier in the day Beck had sent the servant girl to Mrs. Beck's first place of refuge to get the child, and on learning that Mrs. Beck had left that house, he got a gun and said, "Well, I will go hunting." (Rec., 34.) Beck's guns had been hidden by the servant girl, and he had gone down town, after 4 o'clock, and procured a gun from the gun store. The evidence tends to show that this was the gun which he took with him when he went in pursuit of his wife. He had this gun in his hand, when he reached the Nolan residence. Mrs. Beck says that he tried to get in by the kitchen door. "Failing to get in, he tried the front

"door, and commenced to bang at the door, but I did not "speak at all. We (Mrs. Beck and Mrs. Nolan) went "upstairs and looked out the bathroom window and we "could see quite well. He had a gun in his hand. * * * "He was gone perhaps an hour and returned, but I could "not say whether he was alone or not." (Rec., 19, 41.) While away the deceased had met his partner, Mr. Votaw, and the latter returned to the Nolan house with him on his second visit. (Rec., 36.)

Votaw testified at the Coroner's inquest (Rec., 21) that deceased had been addicted to drinking heavily for the preceding two years, but had not been drinking for six weeks prior to his death, until "about four days ago," that is, the preceding Wednesday, when he had the altercation with his wife above referred to. Votaw stated that on the fatal day he had met Beck about 7:30 P. M. He (Beck) had not been to the office that day, and Votaw stated that he had received a telephone message from him during the afternoon, saying that he wanted to see him. Beck's behavior that day about the gun had so alarmed the servant girl that she had gone down to the laundry to inform Votaw of it. (Rec., 22.) On meeting Votaw, Beck began talking about his family troubles, and requested Votaw to go to Mr. Nolan's and tell his wife that he wanted her to come home with the little child "right away." Beck accompanied the witness to the house, and his manner must have alarmed Votaw, who cautioned him "not to do anything rash; there are other ways "of settling this difficulty without doing anyone any harm." On arriving at the house the following account is given by this witness of what took place (Rec., 22):

"When we got there on the porch he rattled on the door "and Mrs. Nolan said, 'Who is there?' He said to me, "'Answer her.' I then said, 'Is Mr. Rasch here?' She

"replied, 'No.' Frank Beck says, 'Hattie (Mrs. Nolan), "let me in.' She says, 'The folks have all gone to bed; come "back in the morning.' That seemed to make him mad, "and he commenced to hammer on the door, and I said to "him, 'Don't do that, Frank. Come away.' I became ex-"cited then and I thought of running for help. I ran up to "the corner and thought to call for help. The noises had "ceased then and I went around the next corner of the ad-"joining block, and I thought he was following me. Not "seeing him, I went back as far as the vacant lot where I "could see and hear everything for a space of about ten min-"utes. Not hearing anything, I went to where my engage-"ment called me, and when I got there it was about 8 o'clock. "* * * To go back a little, while Beck was at Nolan's "front door trying to get in, he said unless his wife let him "in he would kill her. He seemed very much excited while "he was pounding on the door."

After this vain attempt to get into the house, Beck went off and procured a gun, no doubt, the one which he had brought with him on his first visit, and which he had concealed somewhere in the meantime. A neighbor, Mr. Frank L. Reece, had been warned by Mrs. Nolan of Beck's actions on his first visit, and had telephoned to the police department for help. Samuel A. Lynch, an officer, was sent in a hack to the Nolan house. There he met Reece, and these two, with the hackman, Gordon, are the principal witnesses as to what occurred after that time. Just as they reached the house they heard the crash of a pane of glass in a window on the side of the house. (Rec., 20.) Reece and Lynch entered the house, under the impression that Beck had effected an entrance. (Rec., 36.) While they were searching for Beck in the house the hackman, standing outside, heard Beck retreating to the rear of the lot, where he entered an

outhouse water closet. (Rec., 33.) The hackman went to the front door and informed Reece and the officer of what he had seen and heard of Beck's movements. The hackman then went to the rear of the house; he was separated from Beck by a lattice work fence, which apparently obstructed the public view of the doorway to the closet. After reaching this position, he heard Beck *step out of the closet and then the discharge of a gun.* (Rec., 37.) *The precise interval of time* between Beck's exit from the closet and the discharge of the gun is not stated, but *it was sufficient to enable the witness to separate them*, and to state, that the discharge of the gun *followed* the sound of Beck's footfall upon the walk. An attempt was made to confuse the witness upon this point, and to make him say that he was uncertain whether Beck fell or stumbled out of the closet, but he was firm upon the point that the sound which he heard was that of a man *stepping down*, and not of a man *stumbling out* of the closet, the floor of which, as appears from the evidence, was somewhat elevated above the plank walk outside. (Abst., 38.)

The position of the other two witnesses at this precise moment is not very clear, but neither of them professes to have seen or heard anything of Beck's movements prior to the discharge of the gun. After that took place, all three went to the closet and found Beck lying on his back partly in and partly out of the closet, with his head in the corner and his feet hanging out over the door sill. (Rec., 37.) The gun with which he had been killed lay between his legs, and the top of his head was blown off, the shot having struck his right eyebrow. (Rec., 26.) The left barrel of the gun was loaded and cocked, the right barrel unloaded and not cocked.

This is substantially all that the testimony disclosed as to the facts immediately surrounding the death of Beck. Owing to the darkness of the night and the intervening lat-

tice work, Gordon, the hackman, could not, apparently, distinguish Beck's movements and necessarily relied more on his sense of hearing than his sense of sight. No one else either saw or heard what occurred at the supreme moment; but the circumstantial evidence, which is abundant, and in entire accord with the testimony of this witness, leaves the mind in no doubt as to whether Beck's death was voluntary or involuntary.

On the day after Beck's death, Sunday, November 1, 1896, an inquest was held, and the following verdict was returned:

"STATE OF MONTANA, COUNTY OF LEWIS AND CLARKE, ss.—In the Matter of the Inquisition upon the Body of Frank E. Beck, Deceased.

"An inquisition holden at Helena, in the County of Lewis and Clarke, on the first day of November, A. D. 1896, before me, Thomas H. Pleasants, Coroner of said county, upon the body of Frank E. Beck, there lying dead, by the jurors, whose names are hereunto subscribed, said jurors upon their oaths do say that Frank E. Beck came to his death on the 31st of October, 1896, by shooting himself in the head with a double-barrel shotgun, with the purpose and intent of committing suicide, while temporarily insane, due, probably, to the use of intoxicants. That the shooting was done in the outside water-closet of the premises now occupied by the family of C. B. Nolan, and that he threatened to kill his wife before killing himself.

"In testimony whereof the jurors have set their hands the day and year aforesaid.

(Signed) R. H. BECKWITH,
(Signed) LOUIS J. ISRAEL,
(Signed) C. A. CAHILL,
(Signed) A. H. LYNN,
(Signed) J. S. ALLING, JR.,
(Signed) A. B. COOKE.

Attest: THOMAS H. PLEASANTS, *Coroner.*"

(Rec., 23.)

On the 11th day of November, 1896, twelve days after Beck's death, the plaintiff made proofs of loss on the blanks furnished by the defendant for the purpose, in which it was stated as follows:

"7. (A.) What was the disease during last illness? (A.) Insanity. (B.) What was the immediate cause of death? (B.) Personal violence. * * *

"9. Duration of last illness? Give full particulars in relation thereto. Details given in evidence attached hereto.

"10. Had the deceased any previous disease, and if so, when and what was the nature of the same? None other than insanity known to affiant.

"11. Give the date as near as possible when health of deceased first became impaired? Particulars appear in testimony. * * *

"13. Was an inquest held? If so, furnish herewith copies of the evidence and finding. Yes; evidence attached.

"14. Was death caused by suicide or violence or from other than natural causes? Suicide." (Rec., 16.)

The evidence attached to this proof of loss was a certified copy of the report of the Coroner's inquest, and the proofs of loss, with this report attached, were offered in evidence by the defendant (Rec., 19), and were received without objection by plaintiff.

Numerous errors were assigned in the trial court and in the Circuit Court of Appeals (Rec., 72-80), but the following only are urged upon the attention of this court.

The Circuit Court of Appeals erred in giving judgment affirming the judgment of the Circuit Court. (Assignment of error XXXII, Rec., 80.)

The Circuit Court erred in overruling and denying the motion of the defendant, made at the close of the evidence in the case, to instruct the jury to bring in a verdict for the defendant. (Assignment of error I, Rec., 72.)

The court erred in sustaining plaintiff's objection to the testimony offered by the defendant as to the character of the guns carried in stock by the witness Doughty, and to the effect that said witness had in his possession several lengths of guns, called the Belgian gun, some long barrels and some short barrels, and that so far as the recollection of the witness is concerned he does not know whether it was a long or short barreled gun that was borrowed by Mr. Beck. (Assignment of error II, Rec., 72.)

The court erred in sustaining plaintiff's objection in objecting to allowing, and in refusing to allow, the witness Lindner to jar the stock of the gun on the floor with the hammers raised to see whether it would go off from a jar. (Assignment of error III, Rec., 72.)

The court erred in overruling defendant's objection and permitting the witness O. G. Beck to use in illustration, the long-barrel gun, as there was no evidence that there was used in the killing of Beck any particular gun, and especially no evidence that the gun used in illustration, did the killing. (Assignment of error IV, Rec., 73.)

The court erred in sustaining the plaintiff's objection and not permitting the defendant to ask the plaintiff the following question: "Is it not a fact, Mrs. Beck, that you have "stated to a great number of persons in speaking about this "case that there was no question but that Mr. Beck com- "mitted suicide, but the company couldn't prove it?" (Assignment of error VIII, Rec., 73.)

The court erred in refusing to give the following instructions tendered by the defendant. Assignments of error, XII and XIII; Rec., 74.)

"Gentlemen of the jury, you will notice that in the proofs of death made and furnished to the defendant by the beneficiary, Lillian H. Beck, the plaintiff herein, under the policy

or certificate upon which this suit is brought, it is stated under oath that the death of Frank E. Beck resulted from suicide. Under the law, this throws the burden of proof on the plaintiff to show that the statements in the proofs of loss as to the manner of the death of Frank E. Beck were made by mistake, or under a misapprehension of the facts, and unless the statements made by her in the said proofs of loss so furnished to the said defendant as to the manner of the death of Frank E. Beck are overcome by proof adduced by her, showing that her husband came to his death by accident or some other causes other than suicide, the proofs so furnished stand as conclusive evidence of the cause of death of the said Frank E. Beck, and you will find that he committed suicide, in accordance therewith, and your verdict must be for the defendant.

"The jury are instructed that as a matter of law governing cases of this character it is held that representations made in the proofs of death as to the manner of death of the assured are intended for the action of the insurance company, and upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. The burden put upon the plaintiff by the representation of suicide makes the case one where she must show that her husband did not purposely kill himself."

The court also erred in giving that part of its charge which reads as follows (Assignment of error, XXX; Rec., 79):

"It has been stated here in the argument, and I told Mr. Loeb I would not give it, that when there is this admission on the part of the plaintiff that death was occasioned by suicide, that then the burden of proof is shifted, and it was necessary for the plaintiff to show that it was accidental. If the proofs overcome this admission and showed that it was not correct—that it was wrong—why, then, it should not control your action. In no case that I know of is such a rule maintained, unless by some decisions in regard to insur-

ance companies. A man may admit something from a lack of knowledge upon the subject, but if it turns out afterwards that he was misinformed, that he had not any adequate knowledge upon the subject, that admission may be disregarded, and should be disregarded. A man is only estopped from denying his admissions and declarations when it would work a fraud upon the other party, and there is no claim in this case—no claim that it would work a fraud upon the defendant in this respect."

The court also erred in instructing the jury as follows (Assignment of error, XXXI; Rec., 80):

"There is only evidence before you that he was killed by a gun discharged through his head, and whether that was done with the intent by himself to commit suicide is for you to determine. If you are unable to determine that fact, then you should find for the plaintiff, because the presumption is that he didn't do it intentionally."

The court erred in refusing to give the following instructions tendered by the defendant (Assignments of error, XIV and XVI; Rec., 75):

"That if the jury find that Frank E. Beck's death occurred while violating the criminal laws of the State of Montana, or while in an attempt at the violation thereof, no matter what they believe was the cause of death, suicide or accident, the plaintiff can not recover under this policy and you will find a verdict for the defendant."

"If Beck died while attempting to or while violating the criminal laws of the State, plaintiff has no claim under the contract between Frank E. Beck and the defendant that would entitle her to a verdict, and you are instructed if you find he was attempting to violate, or was violating the criminal laws of this State at the time of his death, the plaintiff can not recover, and you will find for the defendant."

The court erred in giving the following instruction as part of its charge to the jury (Assignment of error, XXIX; Rec., 79):

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"Here is an instruction asked, which I refused, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he can not recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he can not recover. If a man is in a quarrel and gets killed, he can not recover. But if a man, contemplating that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply."

The court erred in giving the following part of the charge as given: "The investigation narrows itself down to the "question as to whether the death of Frank E. Beck was "an act of suicide, whether voluntary or involuntary, while "sane or insane, or whether it was accidental." (Assignment of error XXII.)

I.

The evidence given on the trial, with all the inferences that the jury could justifiably draw from it, in favor of the plaintiff, was insufficient to support a verdict for the plaintiff, and the court should have directed a verdict for the defendant.

Randall v. *Railroad Co.*, 109 U. S., 478.
Pleasant v. *Fant*, 22 Wall. (U. S.), 116.
Herbert v. *Butler*, 97 U. S., 319.
Bowditch v. *Boston*, 101 U. S., 16.
Griggs v. *Houston*, 104 U. S., 553.
Elliott v. *Railroad Co.*, 150 U. S., 245.
Railroad v. *Houston*, 95 U. S., 597.
Schofield v. *Railroad Co.*, 114 U. S., 615.
Aerfketz v. *Humphreys*, 145 U. S., 418.
Union, etc., R. Co. v. *McDonald*, 152 U. S., 262, 283.

Delaware, etc., R. Co. v. *Converse,* 139 U. S., 469.
Anderson County v. *Beal,* 113 U. S., 227, 241.
Somerville v. *Indemnity Co.,* 11 App. Cas. (D. C.), 417.
Agen v. *Metropolitan Life Ins. Co.* (Wis.), 80 N. W., 1020.
Northwestern, etc., Assn. v. *Maguire,* 19 Oh. C. C., 502.
Sovereign Camp v. *Haller* (Ind.), 56 N. E., 255.
Merrett v. *Assn.* (Minn.), 57 N. W., 169.
Kornfeld v. *Supreme Lodge,* 72 Mo. App., 604.
Ingraham v. *National Union* (Ia.), 75 N. W., 559.
Agen v. *Metropolitan Life Ins. Co.* (Wis.), 80 N. W., 1020.
Rens v. *Assn.* (Wis.), 75 N. W., 99.
Mutual Life Ins. Co. v. *Hayward* (Tex. Civ. App.), 27 S. W., 36; 34 S. W., 801.

II.

The testimony of the witness Doughty, as to the character of guns which he kept for rent, offered by the defendant and excluded by the court, was competent, relevant and material.

III.

The demonstration sought to be made before the jury of the qualities of the gun produced in court, offered by the defendant and excluded by the court, was competent, relevant and material evidence.

IV.

The experiment made before the jury by the witness O. G. Beek with the gun produced in court but not identified as the gun with which the deceased was killed, was incompetent, irrelevant and immaterial.

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V.

The question addressed to the plaintiff while testifying as a witness in her own behalf as to the declarations made by her as to the cause of her husband's death, and excluded by the court, was competent, relevant and material.

VI.

The admission in the proofs of loss presented by the plaintiff, of the suicide of the deceased, destroyed the legal presumption in favor of accidental death and made a prima facie case for the defendant, which, in the absence of countervailing evidence, would have required a verdict for it; and the plaintiff, to overcome this prima facie case, was required to present sufficient evidence to more than offset the affirmative evidence thereafter presented by the defendant.

Mutual Benefit Life Ins. Co. v. *Newton*, 22 Wall. (U. S.), 32. *Ibid*, 38.

Sharland v. *Washington Life Ins. Co.*, 101 Fed., 206.

Hanna v. *Connecticut Mut. Life Ins. Co.*, 150 N. Y., 526.

Spencer v. *C. M. L. Ins. Assn.*, 142 N. Y., 505, 510.

Prudential Ins. Co. v. *Brenstle* (Ky.), 41 S. W., 9.

Keels v. *Mutual Reserve Assn.*, 29 Fed. Rep., 198.

Cochran v. *Mutual Life Ins. Co.*, 79 Fed., 46.

Dennis v. *Union Mutual Life Ins. Co.* (Cal.), 24 Pac., 120.

Spruill v. *Northwestern Mut. Life Ins. Co.* (N. C.), 27 S. E., 39.
Scott v. *Wood*, 81 Cal., 398.

VII.

The charge to the jury, contained in assignment of error XXXI was erroneous.

VIII.

That part of the defendant's answer setting up the defense of death caused or superinduced by the violation or attempted violation of the criminal laws, is sufficiently certain and definite, in the absence of a demurrer to the pleadings or the evidence, or other appropriate objection to its defects, at or before the trial.

Montana Code of Civil Procedure, Sec. 740 (1895).
Ibid, Sec. 770.
Ibid, Sec. 778.
Cal. Code Civ. Proc., Sec. 475.
Colo. Code Civ. Proc., Sec. 81.
N. Y. Code Civ. Proc., Sec. 723.
Ore. Code Civ. Proc., Sec. 104.
Weston, etc., Co. v. *Uhlhorn* (La.), 6 So., 486.
Crawford v. *Satterfield*, 27 Oh. St., 421.
Bethel v. *Woodworth*, 11 Oh. St., 393.
Erwin v. *Shaffer*, 9 Oh. St., 43.
Burke v. *Wilbur*, 42 Mich., 327.
Griffin v. *Pratt*, 3 Conn., 513.
Hall v. *McKechnie*, 22 Barb., 244.
Page v. *Monks*, 5 Gray (Mass.), 492.

Boyce v. *State Co.*, 25 Cal., 47.
Bell v. *Knowles*, 45 *id.*, 193.
King v. *DeCourcey*, 8 Colo., 463.
McDermott v. *Grimm*, 4 Colo. App., 39.
Sibila v. *Balmey*, 30 Oh. St., 399.
Cummings v. *Petch*, 41 Minn., 115.
Coates v. *First National Bank*, 91 N. Y., 31.
Gillies v. *Improvement Co.*, 147 N. Y., 420.
Egert v. *Wicker*, 10 How. Pr., 193.
Salazar v. *Taylor*, 18 Colo., 538.
North Star, etc., Co. v. *Stebbins*, 3 S. D., 540.
Stokes v. *Brown*, 20 Ore., 530.
Dunn v. *Durant*, 9 Daly, 389.
Catlin v. *Gunther*, 11 N. Y., 373.
Dunn v. *Durant*, 9 Daly, 389.
Railway Co. v. *Dailey*, 110 Ind., 75.
Warbritton v. *Demorett* (Ind.), 28 N. E., 613.
Quirk v. *Clark* (Mont.), 14 Pac., 669.
Pettis v. *Westlake*, 4 Ill., 535.
Malcolm v. *O'Reilly*, 89 N. Y., 156.
Doyle v. *Knapp*, 4 Ill., 334.
Began v. *O'Reilly*, 32 Cal., 11.
Engel v. *Hardt*, 56 Wis., 456.
Paul v. *Silver*, 16 Cal., 75.
Mulliken v. *Hull*, 5 Cal., 245.
Coleman v. *Playstead*, 36 Barb., 26.
Clark v. *Dales*, 20 Barb., 42.
Railroad Co. v. *Lindsay*, 4 Wall., 656.
Ewing v. *Howard*, 7 Wall., 500.
Stockton v. *Bishop*, 4 How., 155.
Conroy v. *Assn.*, 17 Ind. App., 62; 60 Am. St. Rep., 154.

IX.

The undisputed evidence establishes beyond question that the death of the deceased, if not suicidal, was caused or superinduced by the violation or attempted violation of the criminal law, and the court should have given the instructions tendered by the defendant as to this defense.

Murray v. *Life Ins. Co.*, 96 N. Y., 614.
Bloom v. *Franklin Life*, 97 Ind., 478.
Neill v. *Ins. Co.*, 31 Up. Can. C. P., 394.
Hatch v. *Ins. Co.*, 120 Mass., 50.
Ins. Co. v. *Seaver*, 19 Wall., 531.
Duran v. *Life Ins. Co.* (Vt.), 22 Atl., 530.

ARGUMENT.

I.

At the close of all the evidence the defendant, by its counsel, filed a motion to direct the jury to return a verdict for the defendant, which motion was overruled. (Assignment of error II.) The following, among other grounds were assigned in support of said motion:

"That under all the evidence herein adduced, a verdict for the plaintiff could not be supported in law.

"That under all the testimony herein adduced, there is no conflict upon the point that the death of Frank E. Beck occurred while said Beck was attempting to and was violating the criminal law of the State of Montana, which of itself would defeat any right said beneficiary would have to recover under the contract of insurance herein."

The two defenses asserted by the answer were (1), suicide; (2) death caused or superinduced by violation or attempted violation of the law. We contend that the evidence established beyond a reasonable doubt that death was due to

suicide; but, even if the jury were at liberty to disregard the conclusive evidence of suicide and guess that Beck's death was accidental, then, on the undisputed facts, his death was caused or superinduced by violation or attempted violation of the law, and the court should have given the above instruction.

The following facts, established by the evidence, show plainly that Beck was a suicide:

1. His family troubles.

2. His homicidal disposition, evidenced by repeated threats to kill his wife or take his own life.

3. The fact that he had been drinking heavily for four days or more.

4. The criminal impulse shown by his procuring the rented gun.

5. His extreme excitement and violent passion immediately preceding the fatal act.

6. His apprehension of arrest and punishment.

7. The positive testimony of Gordon, the hackman, as to what actually occurred.

8. The position in which the body was found.

9. The absence of powder burns.

10. The impress of the gun barrels near the wound.

11. The nature of the wound.

12. The absence of any circumstance to support the theory of accidental death.

13. The universal opinion, shared by Mrs. Beck and her attorney, that he committed suicide.

Beck's family troubles are clearly shown by the evidence of his wife (Rec., 19, 41), of his partner (Rec., 22, 36), of his brother (Rec., 39), of Hilda Carlson, a former servant

in the family (Rec., 29), and of Hilda Borg, the servant at the time of Beck's death (Rec., 33)—in fact of every one testifying at the inquest or trial who knew anything of the family history. The testimony of Mrs. Beck and of the two servant girls abounds with instances of quarrels so acrimonious that the plaintiff was exasperated at times to the point of throwing knives and inkstands at her husband (Rec., 29, 44), while the latter appears to have exhausted every form of outrage and insult which a drunken man can inflict upon a helpless woman, not stopping short of physical indignities. His affection for his child, instead of moderating his behavior towards his wife, appears to have been an additional cause of contention, as is often the case where the husband abandons himself to his appetite for drink. The wife in such a case naturally resents, not only the indignities heaped upon herself, but the shocking example afforded to her child by the recreant father. Undoubtedly this domestic discord was the primary source of the suicidal impulse which resulted in Beck's death.

Beck's frequent threats, especially when in liquor, to kill his wife and to terminate his own existence, of which there is abundant testimony in this record from the lips of Mrs. Beck and the two servant girls (Rec., 29, 35, 43), indicate that lack of mental balance which too often seeks refuge from its self-created troubles, in suicide. The utterance of such threats, whether the intention was really entertained at the time or not, indicates a nervous organization and mental constitution liable to result, under some sudden conception of imaginary wrong or gust of unreasoning passion, in violence to himself or others. He was in this irresponsible mood on the day of his wife's flight, and her flight indicates conclusively that his manner in making the threat was such as to inspire extreme fear.

"I was afraid that Mr. Beck was going to kill me be-
"cause I told him I wouldn't go home until he stopped
"drinking. I was just afraid. He made threats against
"my life; he said if I did not go and live with him he would
"kill me; that was within a month of the time of his death;
"he said it before that too; I can't tell how long. I went
"back to Mr. Beck with the understanding that he was to
"stop drinking, but not two years ago; I think it was six or
"seven weeks before he died. That was about the time he
"threatened to kill me, and that was why I left." (Rec., 43.)

While there is some evidence of other causes of dispute on which we do not care to dwell, the evidence is abundant that Beck's family troubles were due principally to his indulgence in liquor. His wife had left him for this reason some six weeks before his death, on which occasion, as well as on the occasion of their last quarrel, he had threatened to kill her (Rec., 43), but had returned to him on his promise of amendment. Hilda Carlson, who had worked for the Beck family for two or three years ending in July, 1895, detailed numerous instances of his giving way to his appetite for drink. After one of his debauches, some four or five months before she left the place, she had a conversation with him on the subject. "I asked him why he didn't quit drink-
"ing. Mr. Beck made the remark one time that a man that
"had as much trouble as he had would be better off dead than
"living." (Rec., 29.) "I remember of calling Mr. Beck's
"attention to the fact that he was drinking heavily, and he
"says, a man that has as much trouble as he had, the sooner
"the end came the better." (Rec., 29.) "Mr. Beck came
"home drunk quite frequently while I was there. * * *
"Three months to my recollection is the longest period he
"went without being drunk." (Rec., 30.) The testimony

of Hilda Borg, who succeeded Miss Carlson in the Beck household, and of Mrs. Beck herself, confirm the testimony of this witness as to Beck's habits for two years or more preceding his death.

So far as the record shows, Beck had kept his promises of amendment, made six weeks before his death, until four or five days before that event. He came home on Tuesday or Wednesday night after midnight "quite drunk," as his wife stated, and remained in that condition until the day of his death.

His conduct at this time was so offensive and alarming to his wife that on Thursday or Friday (the evidence is not clear which), she took the child and left the house, concealing from him the place to which she had gone. (Rec., 41.) It is not surprising that Beck, under such circumstances, should continue his debauch and perhaps push it to even greater excesses, as is indicated by the testimony of his partner (Rec., 22), that he did not come to the office at all on Saturday, and of the servant girl (Rec., 33), that he remained in bed on that day until 4 o'clock in the afternoon. A prolonged debauch with the resulting disorder of the nervous system strongly impels the victim to self-destruction or other homicidal crime. He ceases to be a moral agent and loses the capacity of apprehending the dictates of duty or realizing the consequences of his acts.

After Mrs. Beck's flight from her home, in consequence of the statement made to her by Hilda Borg, "He has got the "guns and will kill you," it would seem that the latter must have hidden the guns again, for she testified that, after making a fruitless search for them on Saturday (Rec., 33), Beck went down town and returned with a gun, which the evidence clearly shows to be the rented gun. (Rec., 34.) This was after he had gotten up, at 4 o'clock in the afternoon.

He returned to the house with this gun and then went out "hunting" his wife. Beck's actions at this time do not indicate that he had formed the intention of committing suicide, unless, perhaps, as a sequel to a more atrocious crime of which his wife should be the victim. The most charitable construction that can be put upon his actions is that his drink-sodden brain had formed the design of terrorizing his wife into returning home or giving up the child. But whatever his intentions may have been, his going to a gun store and possessing himself of a gun in the absence of the proprietor, with which gun he subsequently went to Mr. Nolan's house (Rec., 34), and there made a demonstration so alarming that the ladies appealed to a neighbor for protection, and all this in the daytime and in the sight of everybody—indicates a settled purpose of mischief and a condition of total irresponsibility, equally favorable to suicide or murder.

The evidence furnished by several witnesses, including Mrs. Beck, Mrs. Nolan, Mr. Votaw, Mr. Reece and the servant girl, Hilda Borg, is conclusive that Beck was in a frenzy of passion when he went to the Nolan house. In broad daylight he first attempted to force an entrance through the kitchen. He then tried the front door, and not being successful there, began pounding or kicking on it. He had the gun with him on this first visit. This frantic conduct was repeated when he returned to the house in about an hour, accompanied by his partner, Votaw, whom he had met on the street. He had hidden the gun in the meantime, probably in the closet. The cunning and mischief of a lunatic are shown by his trick of inducing Votaw to inquire if "Mr. Rasch" was there, doubtless hoping that Mrs. Nolan or Mrs. Beck would be deceived into opening the door, not knowing he was present. His persistence in returning a third time about 7:30 or 8 o'clock P. M.—this time with the gun which he had hid-

den before making his second visit—hammering and kicking at the door, and, on failing to secure admission, breaking a window in order to effect an entrance, just as the policeman reached the house—these facts indicate that his frenzy had reached its climax.

It is impossible to conceive of a state of mind more favorable to suicide than that of Beck at this moment. His actions present an ascending scale of probabilities, each indicating more strongly than the last the frame of mind in which a man must find himself before the instinctive shrinking from death is overcome and he defies "the Almighty's canon against self-slaughter." If anything further was required to urge the wretched man to the last act of a miserable life, it was the arrival of the officer. As his carriage drove up he was met by Reece and they entered the house together, just after Beck had broken the window, expecting to find him within. Defeated in his criminal purpose, with arrest and a disgraceful punishment in prospect, suicide, to which his mind naturally recurred when under the influence of liquor, appealed to him with irresistible force. After what appears to have been a foolish attempt at concealment in the outhouse he stepped out of the door, and, resting the gun on the ground and his head on the muzzle, blew his brains out.

That this is no fancied picture of what actually occurred, all the physical facts attending the death of the unfortunate man attest. The clumsy theory of Beck having forgotten the step and fallen as he came out of the closet is directly opposed to the testimony of the hackman, Gordon. He stated that he heard Beck *step out* of the closet before the gun was discharged, and in spite of a severe cross-examination, he adhered to this statement, repudiating the suggestion that Beck might have *fallen out,* as inconsistent with what he actually heard. If Beck had fallen, *the discharge must have*

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followed so close upon the sound of the gun striking the walk that they would have been indistinguishable. Moreover, the shock of the gun striking the sidewalk would also have been utterly unlike the footfall of a person stepping down to the walk.

This theory also disregards the elementary laws of physical science in regard to moving bodies. The position in which the body lay shows beyond question that Beck was not *falling forward* when he was killed. He lay on his back, on the floor of the closet, with his feet projecting from the door and the gun lying between his legs. That is the natural position for the body to assume when death results from a gun pointing upward and backward and the head resting on the muzzle, the position in which a suicide would naturally hold the weapon. The force of the blow drives the head back and the body follows it. It is impossible to conceive of any way in which the accidental discharge of the gun, caused by Beck's stumbling or falling out of the closet, could have produced this effect. The effort to establish the possibility that the gun might have been discharged by the butt being struck forcibly against the ground was an absolute failure, as we shall show; but conceding, for the purpose of argument, that it might have been done, *it would have been impossible for the body to fall as it did.* The gun must have been carried in front of Beck, muzzle up; he must have fallen with sufficient force to discharge it and he must necessarily have fallen forward towards the gun. In such a case, the butt striking the ground while Beck, grasping it somewhere along the barrel, continued to fall forward, the muzzle would have been pushed further away from Beck as his fall continued and the shot would have been harmlessly discharged into the air.

But, waiving the insuperable difficulties which we shall

show in the theory of accidental discharge, and assuming that, as a fact, the gun did manage to discharge itself accidentally, and that the shot did strike Beck, the momentum of his body, projected forward from the closet by his misstep, would have carried him on, in spite of the blow from the shot, and he would have fallen *out of the closet on his face and on top of the gun*, instead of, *in the closet, on his back, with the gun on top of his body.* It is true that the velocity of the load from a shotgun is several hundred feet per second as contrasted with the probable velocity of a few feet per second of a man's body falling forward from a misstep; but an average man's weight is 150 pounds, while the weight of a load of shot is not more than an ounce and a half. *There is no imaginable combination of circumstances consistent with the established facts, which will admit of Beck's having accidentally killed himself, and then fallen in the position in which he was found.*

The undertaker who prepared the body for burial testified that there were no powder burns on the face of the deceased. After qualifying as an expert, he testified, that, where death results from a gunshot wound inflicted by a firearm in the hands of the deceased, powder burns are always found if the weapon is not held against the body. This is a matter of common knowledge and of obvious necessity, even to those who have had no practical experience of the fact.

Several witnesses testified as to the appearance of the face of the deceased, but none of them contradicted the witness as to the absence of powder burns. The theory of accidental discharge of the gun therefore requires that Beck's face struck the muzzle of the gun at the *precise moment* that the load left the barrel. If it had not reached the barrel in his supposed fall, his face would have been powder-burned; if it had reached it before the discharge, the forward move-

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ment of his body would have thrown the barrel from him and the shot would not have struck him. The theory of accidental death requires that the gun should have been discharged during a period of time measured by a minute fraction of a second. It also requires that Beck's head should have been in a *horizontal instead of a vertical position*, that the gun, the stock of which was necessarily held above the floor of the closet and the feet of Beck, should have been jerked down by him, on missing his footing, so as to strike the ground before his feet did; that Beck, instead of falling forward in a heap, or recovering himself by a recoil of his head and body,—the ordinary and customary result of missing one's footing in the way supposed in this case,—should have doubled up at the hips, like a clasp knife, throwing his head down upon the muzzle of the gun; that the gun should have been held at such a distance from him that, on his body describing this extraordinary movement, his head could come in contact with the muzzle at the moment of discharge, instead of being projected far beyond it, as would have been the case if Beck had been holding the gun close to his body a person usually holds a gun when he is carrying it muzzle upwards. Is it possible to conceive of a worse maze of improbabilities and impossibilities than this singular theory requires us to assume?

The undertaker also testified that the flesh of the deceased showed the impress of a gun barrel on the left side of the face under the eye and against the bridge of the nose. (Rec., 26.) The testimony of the witness as to this fact is confirmed by one of the jurors (Rec., 28) and by Mrs. Beck herself. (Rec., 42.) This is quite consistent with the theory of intentional suicide; but, like the absence of powder burns, it requires the supposition, on the theory of accident, that the face of the deceased struck the muzzle of the gun at

the precise moment when the load was expelled from the barrel. This fact of the impress of the muzzle was made much of in the brief of opposing counsel in the court below, probably because it is *the only fact fully established by the evidence which is not absolutely irreconcilable with the theory of accidental discharge.* The mark might have been made by Beck falling on the gun, just as it might have been made by his pressing the gun against his face; but, as we have shown, the overwhelming probability is in favor of the latter supposition.

The nature of the wound is quite consistent with the theory of suicide and absolutely inconsistent with the theory of accident. The top of the skull was blown off. (Rec., 26.) It is a matter of common experience that suicides who kill themselves by means of a gun invariably direct the weapon towards the brain rather than the body, because death is certain and instantaneous and the length of a gun barrel makes the brain the only vital organ which can be conveniently reached when that weapon is used. But if the weapon is accidentally discharged, the position of the wound would be largely governed by the doctrine of chances; and it is, as already pointed out, difficult, if not impossible, to conceive of any relative position of the gun and the body of the deceased which could result in the accidental shooting away of the top of the skull. Combined with all the other circumstances, this improbability verging upon impossibility, is most persuasive evidence of suicide.

In the absence of any other testimony, this evidence, confirming the admission of the plaintiff in the proofs of death, established beyond question the fact of suicide. An effort was made, however, to furnish some testimony in support of the theory of accidental death.

The evidence relied on to sustain this theory consisted of:

1. A demonstration in the presence of the jury that a gun, exhibited in the court room but *not identified as the gun with which Beck had been killed*, was so long in the barrel (*thirty-two inches*) that *the brother of the deceased* could not reach the trigger while the muzzle was pressed against his forehead. (Rec., 38.)

2. The opinion of a gunsmith that a gun might be discharged by forcibly striking the butt against the ground, though the same witness testified that *the gun in court* had a *trigger pull of about nine pounds* (!) and that it had "binding" (an obvious stenographer's error for "rebounding") locks, *which would prevent its being discharged except by pulling the trigger.* (Rec., 40.)

This is all the evidence which was adduced in support of the theory of accidental discharge of the gun that killed the insured. As to the first item, in addition to the fatal infirmity already pointed out, in the failure to identify the gun produced in court, it is proper that we should call the court's attention to the very peculiar condition of the evidence in regard to the gun, the discharge of which resulted in the death of Beck.

Beck was making an attack on the house of Mr. Nolan, a friend of the family, during Nolan's absence from the city. The persons who found his body immediately after death and the gun with which his life had been ended, were Mr. Reece, the next door neighbor of Mr. Nolan, Lynch, an officer of the law, and the hackman who had brought him there. Reece and the hackman testified at the trial, but strange to say, *neither of them was asked whether the gun in the court room was the gun found by Beck's body.* The natural course was to turn the weapon, with which the wound had been inflicted, over to the coroner, and there is evidence

in the record, produced by defendants in error, to the effect that this was done. (Rec., 39-46.) The gun was doubtless delivered to Beck's family after the inquest. Mrs. Beck and her attorney undoubtedly knew of the custody from which the gun produced in the court room came, and, if it had been Beck's gun or the gun with which Beck killed himself, some one could have identified it positively and given its history since that fatal night. But, searching the record from end to end, *not a word is found which could have justified any reasonable man in believing that it was Beck's gun, or any evidence at all that it was the gun with which Beck was killed, which was produced in the court.* Mrs. Beck testified that it looked like his gun, but qualified even this indefinite language with the statement that "all guns look alike "to me!" Yet Mrs. Beck was sufficiently familiar with fire arms to have a gun of her own, with which she appears to have joined in field sports with her husband. (Rec., 41, 45.) She certainly knew as a fact, whether the gun in question was her husband's gun, for if it was, it must have been produced by her; and her failure to so state is *conclusive evidence that it was not.* Beck's brother testified that the gun in court "looked very much like" the gun of the deceased. Yet this witness was in his brother's employ and had lived in his house for four years. (Rec., 38.) *But no one testified that the gun in court was the gun with which Beck was killed.*

This was all the evidence as to the identity of the gun produced in court. Some effort was made to induce the Swedish girl, who was working for the Beck's at the time, to say, that Beck had taken the longest of his guns when he went "hunting" for his wife (Abst., 35), but her testimony upon this point is confused, more or less contradictory, and, so far as it tends to throw any light on this question, is un-

favorable to the plaintiff. At one time she stated that it was the rented gun, and her account of his looking for his guns, and on failing to find them, going down town and returning with another gun, shortly after which he set out to "hunt" Mrs. Beck, strongly confirms this statement. *She was not even asked if the gun in court was the gun which he took with him when he started on his fatal errand.*

On the whole evidence, therefore, it appears (1) either that Beck was killed with the rented gun, or (2) that if he was killed with one of his own guns, which one, whether the "long gun" or the "short gun," was not shown, (3) that the gun produced in court was not identified as Beck's gun or the gun by which he was killed, *although the evidence as to both facts must have been abundant and within the control of the plaintiff.*

What, then, is to be thought of this total failure of proof as to the vital fact on which plaintiff's whole case depended? To this question there can be but one answer—that the gun with which Beck was killed was *too short for the misleading experiments before the jury,* of the witness Beck, the brother of the deceased, and *that the gun produced in the court room was not the gun which was found by the body of the deceased.*

Thus the evidence produced in support of the plaintiff's theory of Beck's death, not only did not tend in the slightest degree to establish that theory, but, by reason of the omission above pointed out, to identify the gun in court as the gun by which Beck was killed, and the uncontradicted testimony of the gunsmith, produced by plaintiff, *that the gun in question could not have been discharged by a jar,* it really strengthens the theory of suicide. If the verdict of the jury is to stand, it must stand, not on the evidence introduced by the plaintiff as to these matters, but on the evidence intro-

duced by the defendant as to what actually occurred at the time of Beck's death.

We have already pointed out the utter absence of any circumstance which could afford a rational support for belief in the accidental discharge of the gun. It is inconceivable that Beck could have forgotten, in the short space of time that separated his entrance to the closet from his exit therefrom, that there was a step up from the plank walk to the floor of the closet. That interval was the time required for the hackman to run to the front door of the house and give notice to the policeman of Beck's presence in the backyard, and then to return to his position in the sideyard, just as Beck stepped out of the closet and blew out his brains. We are required to believe, on the theory of accident, that Beck had forgotten this fact and had stepped out of the door expecting to find the walk on a level with the floor, and so, had been thrown forward on the gun,which was discharged by the shock. No evidence was adduced from which such a fact could be inferred; it is a matter of naked guess work. The jury in entertaining so baseless a conjecture disregarded all the facts in evidence and substituted therefor the mere suggestions of their own imaginations.

What other construction can be put on their verdict? In the record are found two lines which dispose absolutely of any contention that there was evidence before the jury on which, as reasonable men having regard for their oaths, they were justified in believing that Beck was killed by the accidental discharge of the gun. Mrs. Beck, who was present at the trial and heard all the evidence (Rec., 44), and who was familiar with every fact in the case, when examined by her counsel as to her testimony before the coroner's jury and the proofs of death to which she had sworn, said: "*I "don't know whether Mr. Beck committed suicide or whether*

"he died accidentally. I don't know now." (Abst., 43.) Though under a strong personal bias by reason of her interest, the plaintiff was unable to say that she believed her husband had met his death through accident. Yet the jury were able to give a verdict in her favor when she herself could not. Is there any theory of the sanctity of the juror's office which can uphold such an abuse of its powers?

> "It is the settled law of this court that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."
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> *Randall* v. *Railroad Co.*, 109 U. S., 478; citing
> *Pleasant* v. *Fant*, 22 Wall. (U. S.), 116.
> *Herbert* v. *Butler*, 97 U. S., 319.
> *Bowditch* v. *Boston*, 101 U. S., 16.
> *Griggs* v. *Houston*, 104 U. S., 553.

To the same effect are

> *Elliott* v. *Railroad Co.*, 150 U. S., 245.
> *Railroad* v. *Houston*, 95 U. S., 597.
> *Schofield* v. *Railroad Co.*, 114 U. S., 615.
> *Aerfketz* v. *Humphreys*, 145 U. S., 418.
> *Union, etc., R. Co.* v. *McDonald*, 152 U. S., 262, 283.
> *Delaware, etc., R. Co.* v. *Converse*, 139 U. S., 469.
> *Anderson County* v. *Beal*, 113 U. S., 227, 241.

> "As was said by this court in the case of *Improvement Co.*v. *Munson*, 14 Wallace, 448, recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there

is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

"It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and, finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial."

Pleasants v. *Fant*, 22 Wallace, 116, 121, 122.

In the case of

Herbert v. *Butler*, 97 U. S., 319,

this court said:

"We decided in *Improvement Company* v. *Munson*, 14 Wallace, 442, and *Pleasants* v. *Fant*, 22 Wallace, 116, that although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render. As the question is

fully discussed in those cases it is unnecessary to repeat the discussion here."

In a case where all the facts pointed, as in the case at bar, to suicide and not to accidental death, it was said:

> "*Mere wild conjecture* as to the cause of death will not suffice to overcome clear and definite proof. It is true that in case of real doubt, the presumption is against the fact of suicide. But where *the evidence is all on one side and that of a character to establish beyond a reasonable doubt the fact that suicide had been committed,* the ordinary presumption opposed to that fact can not be allowed to counteract and destroy the rational conclusion deducible from such clear and definite proof. Here the claim of the plaintiffs is attempted to be supported upon the surmise that the assured may *have come to his death* by accident or by the hand of a robber or in conflict with some unknown person. But each and every circumstance in proof tends directly and with a force that can not be resisted to repel such hypotheses."
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> *Somerville* v. *Indemnity Co.*, 11 App. Cas. (D. C.), 417.

Where the reasonable probabilities from the evidence all point to suicide as the cause of death, so as to establish it in the light of reason and common sense with such certainty as to leave no room for reasonable controversy on the subject, a jury should not be permitted to find to the contrary, and have such finding stand as a verity in the case, but the question should be decided by the trial court as one of law.

> *Agen* v. *Metropolitan Life Ins. Co.* (Wis.), 80 N. W., 1020.

Where the only persons who saw the deceased at the time of his death stated that he put the pistol to his head and fired it, the court held that, there being no evidence of ac-

cidental death, a judgment for the plaintiff could not be allowed to stand.

> "Where there is manifestly no evidence to support the verdict of a jury, then a reviewing court is justified and it is its duty to interfere when the verdict is predicated on no evidence or when there is not sufficient evidence to warrant the conclusion of the jury."
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> *Northwestern, etc., Assn.* v. *Maguire*, 19 Oh. C. C., 502.

Where the deceased, on being unexpectedly served with notice of a divorce suit and an order restraining him from entering the family homestead, disappeared, and was found drowned in the creek, on the bank of which his hat was found, near tracks leading down to the water and none coming out, it was held that the evidence of suicide was conclusive and that a verdict for the plaintiff could not be sustained.

Sovereign Camp v. *Haller*, 56 N. E., 255 (Ind.)

Where in an action upon a policy of life insurance, the evidence was slight as to how the deceased came to his death, but such evidence as there was, favored the theory of suicide, the judgment for the plaintiff was reversed and a new trial was not granted.

> "Of a half dozen or more possible theories, the jury have found one *inconsistent with what little evidence there is, and base a verdict upon it.* Until there was *some evidence* tending to show that death resulted from accident rather than design, or from natural causes, such as apoplexy or heart failure, there was nothing to go to the jury. * * * Until some proof is offered tending to establish one of several equally reasonable theories, some consistent with the theory of accidental death and some inconsistent with it, a case is not made out."
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> *Merrett* v. *Assn.* (Minn.), 57 N. W., 169.

Where the deceased, a waiter in a restaurant, after shooting another waiter, rushed into a toilet room, whence a pistol shot was heard in about two minutes, and he was found dead from the effect of a pistol shot through the head, no other person being present in the room at the time, it was held that a peremptory instruction in favor of the defendant should have been given, and a judgment for the plaintiff was reversed without remanding.

Kornfeld v. *Supreme Lodge*, 72 Mo. App., 604.

The likeness of this case to the case at bar is most striking. The deceased in both cases, was laboring under violent excitement; he had just committed an offense against the laws for which he had reason to apprehend a severe punishment; and in either case the supposition of accident requires the assumption of absurd improbabilities. The only difference lies in the fact that in the Missouri case there were *no facts absolutely irreconcilable with the theory of accident*, while there are many in this case.

Where the deceased, a public officer, was found on Sunday morning in the vault of his office, ten minutes after two pistol shots had been heard, dying from the effect of two pistol shot wounds, in the side of his head, a pistol kept in the vault lying beside him, the evidence leaving no room for the supposition that the wounds had been inflicted by another, a verdict for the plaintiff was held not supported by the evidence, and the judgment was reversed without remanding. In this case, as in the case at bar, the nature of the wounds was irreconcilable with the theory of accident.

Ingraham v. *National Union*, (Ia.), 75 N. W., 559.

Where the deceased was found leaning against the wall in his residence with his legs outstretched on the floor, his hat and pistol being found beside and partly under his body,

with a pistol shot wound in his temple at right angles to the side of the head, the court held that suicide was conclusively established. "The fact that the pistol was held at "right angles with the head when discharged and that the "deceased was standing upright, as indicated by the manner "in which he lay when found, destroys utterly the presump- "tion of accident, because of the impossibility, to say noth- "ing of improbability, of the firearm getting by any other "means than that of design, into the requisite position to "caused the wound as it is caused. *So all presumptions in "the plaintiff's favor are rebutted by the physical situation.*" And the court, after examining the testimony of the wife of the deceased as to the conduct of the deceased, just before his death, and showing that it was inconsistent with the established facts as to her own acts at the time, continued:

> "What have we left but a multitude of circumstances all pointing to and consistent with the theory of suicide and inconsistent with any other reasonable theory? Nothing that can be found in the record. * * * The jury could not have said, as men, that the circumstances did not show suicide so as to leave no reasonable probability to the contrary; therefore it was not permissible for them to say different as jurors and have that stand as the verity in the case. The court should have granted the motion to direct the verdict."
>
> *Agen* v. *Metropolitan Life Ins. Co.*, (Wis.), 80 N. W., 1020.

The same course was held proper in the similar case of *Rens.* v. *Assn.* (Wis.), 75 N. W., 99.

Any fact absolutely inconsistent with the theory of accidental death, and plainly indicating suicide, is decisive of the case. Thus where the deceased died from morphine poisoning, leaving a letter clearly indicating an intention to commit suicide, that fact was held to dispose of the conten-

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tion that he had taken an overdose by mistake, and a judgment for the beneficiary was reversed.

Mutual Life Ins. Co. v. *Hayward*, (Tex. Civ. App.), 27 S. W., 36; 34 S. W., 801.

We insist that there is no evidence in this record which can justify the verdict and judgment and that the defendant's peremptory instruction should have been given.

II.

The court erred in sustaining plaintiff's objection to the testimony offered by the defendant as to the character of the guns carried in stock by the witness Doughty, and to the effect that said witness had in his possession several lengths of guns called the Belgian gun, some long barrels and some short barrels, and that so far as the recollection of the witness is concerned he does not know whether it was a long or short barreled gun that was borrowed by Mr. Beck.

The refusal by the court to allow the witness to give this testimony was certainly error. It had already been established that Beck died from a gunshot wound received from a gun in his possession at the time. This witness had testified that before his death Beck had rented a gun from him and that it was returned after his death by O. G. Beck or Mr. Votaw. It was competent, therefore, to show by the witness the character of the guns which he kept in stock for renting purposes. A gun of unusual length (Rec., 40) was afterwards introduced into the court room and experiments were made with it in the presence of the jury. It was never proved that this gun was the gun with which Beck killed himself, and in the absence of all evidence on this point the defendant was certainly entitled to show that the rented gun in Beck's possession at the time, and which may have been the gun with which he killed himself, was short enough to per-

mit of its discharge by the deceased. Evidence as to the length of Beck's own guns was afterwards brought out by the plaintiff on the cross examination of the witness for the defense, Hilda Borg (Rec., 34) (though there was no evidence whatever that he was killed by one of those guns), and as the only shadow of evidence in support of the plaintiff's claim of accidental death consisted in the misleading experiments with the unidentified gun, the refusal of this testimony was highly detrimental to the defendant.

III, IV.

"The court erred in sustaining plaintiff's objection in objecting to allowing, and in refusing to allow, the witness Lindner to jar the stock of the gun on the floor with the hammers raised to see whether it would go off from a jar."

"The court erred in overruling defendant's objection and permitting the witness O. G. Beck to use in illustration the long-barrel gun, as there was no evidence that there was used in the killing of Beck any particular gun, and especially no evidence that the gun used in illustration did the killing."

The first ruling was patent error and it is impossible to see on what grounds the court refused to allow this experiment to be made. The plaintiff's whole theory depended on the possibility of accidental discharge of the gun, and the witness who was requested to make this experiment had just testified, in support of that theory, that a defective gun might be discharged by percussion against the ground. He was then requested to take the *identical gun produced in court as Beck's gun,* and inferentially the gun with which he had killed himself, the gun to which attention had been directed on his examination in chief, and jar it against the floor with the hammers raised, to see whether they would fall. If the witness' mere statement that the gun *might be* discharged under some circumstances was competent, clearly the demon-

strated fact that it *could not be* discharged by any blow, however powerful, was competent, on cross examination, as tending to nullify the effect of the witness' opinion as to what the fact might be. It can hardly be asserted that the *opinion* of an expert as to what ought to happen under given circumstances is better evidence than the fact itself, when that may be shown to the jury.

Aside, however, from its competency as legitimate cross examination, the defense was entitled to bring out this fact as substantive evidence on the chief issue. It struck at the heart of the plaintiff's theory, by showing that accidental discharge of the gun in question under the circumstances in evidence was impossible. It is not surprising that counsel for plaintiff interposed an instant objection.

The ruling of the court on this point is in inexplicable contrast with its ruling on the objection of defendant to the witness O. G. Beck, a brother of the deceased, making an experiment with the unidentified gun, the object of which was to show that the deceased could not reach the trigger with the gun pressed against his forehead. The only conclusion which we can draw from these inconsistent rulings is that in an action on a policy of life insurance it is competent for the beneficiary to show, by an experiment before the jury, that the death could not have happened in the way the insurer asserts it did happen; but that it is not competent for the insurer to show that it could not have happened in the way the beneficiary asserts it did.

V.

The court erred in sustaining the plaintiff's objection and not permitting the defendant to ask the plaintiff the following question: "Is it not a fact, Mrs. Beck, that you have

"stated to a great number of persons in speaking about this "case that there was no question but that Mr. Beck com- "mitted suicide, but the company couldn't prove it?"

The question which was ruled out was one which went to impeach the witness, by laying the ground for evidence of her declarations inconsistent with her testimony delivered on the trial and inconsistent with the maintenance of her suit. Mrs. Beck had just stated that she did not know, at the time of making the proofs of death, *or at the trial*, whether her husband committed suicide or not. If she had made those declarations, proof of them would have seriously impeached her credibility.

But the ruling was also erroneous because these declarations, if made, cut the ground from under the whole case of the plaintiff, being directly contradictory of the complaint. No case can be found in the books in which the plaintiff was allowed to recover after acknowledging that the defendant owed him nothing. Juries are not permitted to trifle with justice by returning verdicts for plaintiffs who acknowledge that they are not entitled to them. If the plaintiff had answered the question in the affirmative, there would have been nothing left for the court to do but to instruct the jury to render a verdict for the defendant; if in the negative, proof of such declarations would have greatly strengthened the defendant's case before the jury. It may be said that this ruling did not exclude proof *aliunde* of the declarations. But the person who makes a declaration or admission is just as competent to prove that fact as the person who heard it; and if her testimony is ruled out, it would be idle to offer other testimony to establish the same fact.

All of the errors assigned on the admission and exclusion of evidence, were ignored in the opinion of the Circuit Court of Appeals. With all due respect to that learned court, we

submit that where there is a manifest preponderance of the evidence in favor of the plaintiff in error, even if not enough to call for a peremptory instruction in his favor, every error assigned upon the exclusion or admission of evidence is entitled to the most careful scrutiny of the reviewing court. Where the verdict given by the jury is not the verdict which the reviewing court would have given if sitting as triers of the facts, the presumption is that the jury has been influenced by the errors of the trial court in admitting or excluding evidence, even more than by the errors in instructing or failing to instruct the jury as to the law of the case. So far as can be judged from the opinion of the Circuit Court of Appeals, the preceding assignments of error relating to the admission and exclusion of evidence, which were presented by the brief in that court, were not even considered.

VI.

The court erred in refusing to give the following instructions tendered by the defendant (Assignments of error, 12 and 13):

"Gentlemen of the jury, you will notice that in the proofs of death made and furnished to the defendant by the beneficiary, Lillian H. Beck, the plaintiff herein, under the policy or certificate upon which this suit is brought, it is stated under oath that the death of Frank E. Beck resulted from suicide. Under the law, this throws the burden of proof on the plaintiff to show that the statements in the proofs of loss as to the manner of the death of Frank E. Beck were made by mistake, or under a misapprehension of the facts, and unless the statements made by her in the said proofs of loss so furnished to the said defendant as to the manner of the death of Frank E. Beck are overcome by proof adduced by her, showing that her husband came to his death by accident or some other causes other than suicide, the proofs so furnished stand as conclusive evidence of the cause of death of

the said Frank E. Beck, and you will find that he committed suicide, in accordance therewith, and your verdict must be for the defendant."

"The jury are instructed that as a matter of law governing cases of this character it is held that representations made in the proofs of death as to the manner of death of the assured are intended for the action of the insurance company, and upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. The burden put upon the plaintiff by the representation of suicide makes the case one where she must show that her husband did not purposely kill himself."

These instructions state the undoubted rule, that an admission by the plaintiff, in the proofs of loss presented to the insurer, that death resulted from some cause expressly exempted by the policy, is *prima facie* evidence of the truth of the facts so admitted, *which casts upon the plaintiff the burden of disproving that evidence.* Some of the other instructions presented by the defendant on this subject are perhaps inartificially drawn, in that they appear to cast upon the plaintiff the burden, not of overcoming this *prima facie* case, but of affirmatively establishing the theory of accidental death. Such, it may be conceded, is not the law. But these two instructions are not vulnerable to any such criticism. They simply require, that, after the introduction of the proofs of loss, the plaintiff should *present evidence outweighing the evidence afterwards presented by the defendant, so as to overcome the prima facie case thus made.*

This rule is supported both by reason and authority. There is no question but that the admission by the plaintiff that the deceased committed suicide, standing alone, disproves the legal presumption—weak as are all legal presumptions—

that the deceased did not commit suicide. So much being conceded, it is obvious that the introduction of further evidence by both sides, evenly balanced or preponderating in favor of the defendant, leaves the case as if no evidence had been introduced except the proofs of loss. This rule has been affirmed in numerous cases.

A leading case on this subject is

Mutual Benefit Life Ins. Co. v. Newton, 22 Wall. (U. S.), 32.

It was there held error to exclude the proofs of death, which stated that the deceased died by suicide, on the ground that they were admissible as *prima facie* evidence of the facts stated therein against the insured and on behalf of the company.

> "They must stand as the acts of the plaintiff and the representations made therein *must be taken as true until at least some mistake is shown to have occurred in them.*"
>
> *Ibid*, 38.

So it has been ruled that a copy of the Coroner's inquest, finding death by suicide, furnished by the beneficiary with proofs of loss, is admissible in evidence and is *prima facie* proof of suicide.

Sharland v. Washington Life Ins. Co., 101 Fed., 206.

Representations as to the cause of the death of the insured, contained in proofs of death furnished by the beneficiary, operate as admissions of a material fact against interest, and while not conclusive, are competent *prima facie* evidence against the beneficiary, and, *if the plaintiff fails to give any evidence showing that the allegation in the complaint as to*

the cause of death was true, the complaint is properly dismissed.

Hanna v. *Connecticut Mut. Life Ins. Co.*, 150 N. Y., 526.

And in an earlier case in the same court where the proofs of death, if believed, established the defense of breach of warranty by the insured, it was said:

> "The burden of proof was not changed by the admission. *Unexplained it would have been conclusive, and the defense would have been made out.*"
>
> *Spencer* v. *C. M. L. Ins. Assn.*, 142 N. Y., 505, 510.

So where the defendant put in evidence the proofs of loss showing "death by his own hand and act," and no other evidence was offered by either side, it was held error to direct a verdict for the plaintiff. The court said:

> "Even if we regard as a satisfactory explanation the statement (in the replication) that this proof was furnished merely as evidence of the death of the assured, and not proof of the cause of his death, still the burden of this issue, as the statement was denied by the rejoinder, was on the plaintiff, and not on the defendant."
>
> *Prudential Ins. Co.* v. *Bruestle* (Ky.), 41 S. W., 9.

So where the plaintiff, in her proofs of death, had stated that the deceased came to his death *by suicide, this admission was held to overcome the legal presumption of death by accident and to cast upon her the burden of showing that the death was accidental.*

Keels v. *Mutual Reserve Assn.*, 29 Fed. Rep., 198.

Where the proofs of death presented by the plaintiff stated that the deceased was *supposed to have committed suicide*, it was said:

"I assume that the statement in the proof of death that the deceased was 'supposed to have committed suicide,' although not the representation of the manner of death, but of a current theory in respect to it, has so far the effect of such a representation, inasmuch as it was intended for the action of the company, as to justify the company in relying upon the assumption that the deceased committed suicide, and *put the burden upon the plaintiff of showing that the manner of death was otherwise;* and the question therefore is, do the facts in evidence warrant the conclusion reached by the jury, that such representation was not true, and that, contrary to it, the deceased was killed by the accidental discharge of his own pistol?"

And the court, after reviewing the evidence tending to establish the fact of accidental discharge and so support the burden of proof thus cast on the plaintiff, held that it was sufficient to sustain the verdict, and denied a motion for a new trial.

Cochran v. *Mutual Life Ins. Co.*, 79 Fed., 46.

So where the affidavits of plaintiff's proofs of loss, showed that the insured committed suicide, *and such evidence was uncontradicted,* a judgment for the plaintiff was *reversed without remanding.*

Dennis v. *Union Mutual Life Ins. Co.* (Cal.), 24 Pac., 120.

Where the plaintiff in making proofs of loss stated that the deceased came to his death by a "*pistol shot from his own hand,*" and these proofs of loss were put in evidence by the defendant, and no evidence to contradict them was offered by the plaintiff, it was held that the court did not err in *directing a verdict for the defendant.*

"The issuing of the policy and the death of the assured, alleged in the complaint and admitted in the answer, made a *prima facie* case for the plaintiff. The

onus was thus shifted by the pleadings to the defendant, and was assumed by it. After the conclusion of its oral testimony the defendant read in evidence the proof of claim sent on to the defendant by the plaintiff, in which it was stated that the cause of death of the assured was 'pistol shot from his own hand.' This statement, unexplained, was an admission of suicide, and *at once shifted the burden of proof upon the plaintiff.*"

Spruill v. *Northwestern Mut. Life Ins. Co.* (N. C.), 27 S. E., 39.

The rule asserted in these instructions which were rejected by the trial court has been well stated in a California case, where it was held that while the burden of proof does not shift from the party on whom it originally rests, it is quite different with the burden of meeting a *prima facie* case. When a *prima facie* case has been made the burden is upon the other party to meet the case so made, at least by evidence of equal value.

Scott v. *Wood*, 81 Cal., 398.

The court also erred in giving that part of its charge which reads as follows (assignment of error 30):

"It has been stated here in the argument, and I told Mr. Loeb I would not give it, that when there is this admission on the part of the plaintiff that death was occasioned by suicide, that then the burden of proof is shifted, and it was necessary for the plaintiff to show that it was accidental. If the proofs overcome this admission and showed that it was not correct—that it was wrong—why, then, it should not control your action. In no case that I know of is such a rule maintained, unless by some decisions in regard to insurance companies. A man may admit something from a lack of knowledge upon the subject, but if it turns out afterwards that he was misinformed, that he had not any adequate knowledge upon the subject, that admission may be disregarded, and should be disregarded. A man is only estopped

from denying his admissions and declarations when it would work a fraud upon the other party, and there is no claim in this case—no claim that it would work a fraud upon the defendant in this respect."

This was an affirmative denial of the rule above contended for and accurately formulated in the instructions tendered by defendant and rejected by the court. The giving of this charge was more harmful than the refusal of the correct instructions tendered by the defendant, as the statement of an erroneous principle is always more hurtful than the refusal to give the correct principle. The latter course at least leaves the jury at liberty to discover and apply the correct principle themselves; the former course actively misleads them.

The effect of refusing the defendant's instruction and giving that which was given, was to deprive the defendant of the presumption of law in favor of the defense of suicide created by the admission in the proofs of loss. But the court went further than this, and in that part of its charge found in Assignment of Error XIX (Rec., 59), asserted that the law presumes that the death was accidental. Where nothing but the fact of death appears, this is a correct statement of the law; *but not where suicide has been admitted by the beneficiary in the proofs of loss.* Such an admission overthrows the presumption of accidental death, and substitutes for it a new presumption of suicide, as all the cases just cited affirm. We deem it unnecessary to argue that an erroneous instruction as to the burden of proof constitutes fatal error.

VII.

The court also erred in instructing the jury as follows (assignment of error 31):

"There is only evidence before you that he was killed by a gun discharged through his head, and whether that was done with the intent by himself to commit suicide is for you to determine. If you are unable to determine that fact, then you should find for the plaintiff, because the presumption is that he didn't do it intentionally."

It was not the fact that there was "only evidence before "the jury that Beck was killed by a gun discharged through "his head." There was not only evidence of suicidal tendencies and of a state of intoxication and ungovernable rage on the part of Beck, but there was positive testimony, by the hackman Gordon, of facts inconsistent with any theory of accidental discharge presented to the jury, and therefore of suicide as a fact. The instruction would naturally be taken by the jury to mean that the evidence showed nothing but the bare fact of death by a gunshot, and they were at liberty to draw their own conclusions as to the manner in which the gun was discharged, and so the jury understood it.

The instruction was also faulty like the one last considered, in stating that the presumption is in favor of accidental death, because that presumption had been conclusively broken down by the proofs of loss.

VIII, IX.

Beck's acts show a plain violation of the criminal law. He was guilty of a breach or attempted breach of the following sections of the Montana code:

> "Every person who wilfully and maliciously disturbs the peace of any neighborhood or person, by loud

or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling * * * is punishable," etc.

Montana Penal Code, Sec. .

"Every person who, not in necessary self defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry and threatening manner * * * is guilty of a misdemeanor."

Ibid, Sec. 755.

"Every person who enters any house * * * outhouse or other building * * * with intent to commit * * * any felony, is guilty of burglary."

Ibid, Sec. 820.

"The word 'enter' as used in this chapter includes the entrance of the offender into such house * * * outhouse, or the insertion therein of * * * any instrument or weapon held in his hand, or used or intended to be used to threaten or intimidate the inmates."

Ibid, Sec. 823.

"Every person having upon him any deadly weapon with intent to assault another, is guilty of a misdemeanor."

Ibid, Sec. 831.

"Every person who maliciously injures or destroys any real or personal property not his own, in cases other than such as are specified in this code, is guilty of a misdemeanor."

Ibid, Sec. 1050.

Under the Montana code, "an act done with intent to commit a crime and tending but failing to effect its commission, is an attempt to commit that crime."

Ibid, Sec. 1229.

"Every person who attempts to commit any crime but fails or is prevented or intercepted in the perpetration thereof, is punishable," etc.

Ibid. 1230.

In every criminal act which Beck attempted to commit, whether successful or not, he was guilty of a violation of the criminal law. The evidence as to his acts is undisputed, and shows a violation by him at or immediately prior to the time of his death of each and every one of these sections of the Penal Code of Montana, as well as an attempt to commit murder.

The Circuit Court of Appeals rejected on very technical grounds the assignments of error based upon the refusal of the court to give defendant's instructions as to the defense set up by the allegation in the answer that Beck "prior to "taking his own life was attempting and did violate the "criminal law," etc. But coupled, as the allegation was, with the paragraph of the certificate exempting the defendant from liability if the death of the insured should be caused or superinduced by the violation or attempted violation of the criminal law, its meaning was plain and sufficiently advised the plaintiff of the defense which would be set up. That is all that is required of any pleading. A pleading that does this ought not to be rejected because of mere errors of grammar or construction, or inaccuracies of diction. The tendency of all modern rules of pleading is in the direction of a liberal construction which will support the cause of action or defense intended to be set up by the pleader. The object of pleading being to give notice to the opposite party of the demand which he must meet, every circumstance is seized upon to help out the defective statement of the pleader. Failure of the adversary to seasonably object, whether by demurrer, motion to make more definite or to strike out the evidence, is generally held to constitute a waiver of tech-

nical defects which might have been cured by amendment. The code states in particular, including Montana, have followed New York in abandoning the strictness of common law pleading and requiring only that the pleading should be sufficiently definite to fairly advise the opposite party as to the state of facts which the pleader's evidence will tend to establish.

The complaint and answer in this case were filed in a Montana court and their sufficiency are to be judged by the law of that State. The Montana Code has the following provisions on this subject:

> "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed with the view to substantial justice between the parties."
>
> Montana Code of Civil Procedure, Sec. 740 (1895).

> "*No variance between the allegation in the pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.* Whenever it appears that the party has been so misled, the court may order the pleadings to be amended, upon such terms as may be just."
>
> *Ibid.* Sec. 770.

> "The court must in every stage of the action, *disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties* and no judgment shall be reversed or vacated by reason of such error or defect."
>
> *Ibid.* Sec. 778.

The codes uniformly provide that an error or defect that does not affect a substantial right, shall be disregarded.

> Cal. Code Civ. Proc., Sec. 475.
>
> Colo. Code Civ. Proc., Sec. 81.

N. Y. Code Civ. Proc., Sec. 723.
Ore. Code Civ. Proc., Sec. 104.

This liberal rule of construction has been recognized and applied in many decided cases, and in varying language.

If the pleadings are of such a character as to advise the parties of the issues respectively made and to enable them to introduce all the evidence in their power, the purpose of the law has been effected.

Weston, etc., Co. v. *Uhlhorn,* (La.), 6 So., 486.

A defective statement in the petition of the cause of action is not a cause for reversal of the judgment, if the fact stated in the petition, when well stated, constituted a cause of action.

Crawford v. *Satterfield,* 27 Oh. St., 421.
Bethel v. *Woodworth,* 11 Oh. St., 393.
Erwin v. *Shaffer,* 9 Oh. St., 43.

A declaration can not be demurred to in the Appellate Court for insufficiency if it was not demurred to in the court below, and if it sets forth the facts intelligently and the proofs made out a sufficient case, and furnished ample material for amending it to satisfy the technical rules of pleading, it will be held good.

Burke v. *Wilbur,* 42 Mich., 327.

It is sufficient if the matter essential to the action may be implied from the allegations made.

Griffin v. *Pratt,* 3 Conn., 513.

So it was said that if the declaration is not sufficiently explicit to enable the defendant to understand it, objection should be raised by demurrer, and that the objection of indefiniteness or uncertainty is waived by not taking it.

Hall v. *McKechnie,* 22 Barb., 244.

So a reference under the rules of court waives all technical exceptions to the declaration.

Page v. *Monks*, 5 Gray (Mass.), 492.

If evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for defendant does not object to it at the time, nor move to strike it out upon the ground of variance, this error is waived.

Boyce v. *State Co.*, 25 Cal., 47.
Bell v. *Knowles*, 45 *id.*, 193.
King v. *DeCourcey*, 8 Colo., 463.
McDermott v. *Grimm*, 4 Colo. App., 39.
Sibila v. *Balmey*, 30 Oh. St., 399.
Cummings v. *Petch*, 41 Minn., 115.
Coates v. *First National Bank*, 91 N. Y., 31.
Gillies v. *Improvement Co.*, 147 N. Y., 420.

The only limitations on the power to permit amendments after judgment to conform the pleadings to the facts proved, are: 1. It must be in furtherance of justice. 2. The amendment must not change substantially the claim or defense.

Egert v. *Wicker*, 10 How. Pr., 193.

A variance in the evidence from the pleadings will be deemed immaterial and is to be disregarded unless the adverse party has been actually misled to his prejudice by such variance, and that fact must be proved to the satisfaction of the court.

Salazar v. *Taylor*, 18 Colo., 538.
North Star, &c., Co. v. *Stebbins*, 3 S. D., 540.
Stokes v. *Brown*, 20 Ore., 530.
Dunn v. *Durant*, 9 Daly, 389.
Catlin v. *Gunther*, 11 N. Y., 373.

So it was held that a judgment dismissing the complaint for variance between the complaint and the proof, could not be affirmed, since no motion was made in the court below to dismiss the action for failure of proof; and the court could not know, had such a motion been made, but that the proof would have been supplied.

Dunn v. *Durant*, 9 Daly, 389.

An error in pleading by which the word "plaintiff" is used instead of "defendant" will be disregarded.

> "Merely clerical mistakes such as the use of one word or one name for another, where, as in this case, there is and can be no possible room for doubt as to which one of two words or names the pleader intended to use, ought not to vitiate the pleadings in any court under the statutory rule that 'its allegations shall be liberally construed with the view to substantial justice between the parties.'"

Railway Co. v. *Dailey*, 110 Ind., 75.

So where the cross complainant used the word "defendant" as descriptive of himself, although in a cross complaint that word really designates the plaintiff in the main action, it was held not reversible error.

Warbritton v. *Demorett* (Ind.), 28 N. E., 613.

So where the complaint did not set out the contract sued on, but it was attached to the complaint as an exhibit and referred to in the complaint, it was held that the defect should have been the subject of a demurrer and was waived by answering. "The contract is before us, not denied; and "the above alleged defect is made the subject of objection "here for the first time. We are of the opinion that this "judgment ought not to be reversed on account of a mere "technicality presented for the first time in this court."

Quirk v. *Clark* (Mont.), 14 Pac., 669.

So where a plea of set-off did not sufficiently describe the notes forming the basis of said plea, it was held that though the plea was demurrable, the error was cured by the plaintiff filing a replication to the said plea and going to trial.

Pettis v. *Westlake*, 4 Ill., 535.

So where the plaintiff's right of action depended upon a demand of payment and refusal by the defendant to pay, a complaint which stated that demand had been made and that thereupon pursuant to the chattel mortgage in question (a copy of which was attached), the complainant became entitled to the possession was held good, a default being clearly implied from the facts stated.

Malcolm v. *O'Reilly*, 89 N. Y., 156.

So a declaration on a note which stated that it was payable "eighteen months," etc., was held good, although it required the addition of a word or words to make explicit the meaning of the pleader. "It is sufficiently certain to "indicate that the promise is to pay in eighteen months "from the date of the note."

Doyle v. *Knapp*, 4 Ill., 334.

So where the complaint alleged that the mortgage sought to be foreclosed allowed 10 per cent. attorney's fees to the mortgagee and the mortgage proved did not contain any such covenant, the variance was held immaterial.

Began v. *O'Reilly*, 32 Cal., 11.

So where the complaint alleged that the defendant was indebted to the plaintiff for procuring a loan while the proofs showed that plaintiff had only procured the money ready to be loaned, this was held not to present a variance. "If the allegations of the complaint were not strictly ap-

"plicable to that state of facts an amendment should have "been allowed without terms."

Engel v. *Hardt,* 56 Wis., 456.

A technical misdescription of the property, as the "northeast" instead of the "northwest" corner, is immaterial.

Paul v. *Silver,* 16 Cal., 75.

"Under our system of pleading, it is only necessary that "the cause of the indebtedness should be stated in such a "manner as to apprize the defendant of the object of the "suit." So a judgment against H., where the suit was brought against "H. & Co." was held to present no variance. The error, if any, could have been cured by the defendant demurring for defect of parties.

Mulliken v. *Hull,* 5 Cal., 245.

So where, in an action of slander, the slanderous words alleged were that the plaintiff had "stolen," etc., while the words proved were "had taken," etc., this was held a variance, but the trial judge having disregarded the variance and allowed the case to go to the jury, this was held equivalent to an amendment of the complaint.

Coleman v. *Playstead,* 36 Barb., 26.

And while it is necessary for the plaintiff to aver willingness to perform at the place of performance, an omission of the last clause is cured by verdict, and the amendment may be made without notice, when the record furnishes the only grounds for and against the same.

Clark v. *Dales,* 20 Barb., 42.

This court has not fallen behind other American courts in ignoring technical defects to which objection has not been made in apt time. Thus it has been held that error can not be assigned upon a variation between the finding of the

court and the petition, where the evidence offered by the plaintiff was not objected to in the court below nor any exception taken when the court announced its findings or subsequently when the judgment was entered.

> "It was in the power of the court to permit the petition to be amended, and the proper amendments would doubtless have been made if the objection had been stated. Under these circumstances, it must be held to have been waived by the plaintiffs in error in the court below, and they are concluded by that waiver in this court."
>
> *Railroad Co.* v. *Lindsay*, 4 Wall., 656.

And in a later case it was held that defects of form in the writ or declaration, not pointed out by demurrer, are not in general regarded in this court as good cause for reversing a judgment brought here by writ of error, as the federal courts possess the power to permit such imperfections to be amended in their discretion and upon such terms and conditions as the rules of the court prescribe.

Ewing v. *Howard*, 7 Wall., 500, citing
Stockton v. *Bishop*, 4 How., 155.

It is too late to object for the first time in an appellate court that there was a misnomer of a party;

Breedlove v. *Nicollet*, 7 Pet., 413;

that there was an insufficient replication;

Erskine v. *Hohnbach*, 14 Wall., 613;

that there was a defect in pleading;

Desobry v. *Nicholson*, 3 Wall., 420;
Coffey v. *United States*, 116 U. S., 436;
The Vaughan, 14 Wall., 258;

that the fact in issue essential to the judgment was not proved

when, for all that appears, proof might have been offered had the objection been seasonably made;

O'Reilly v. *Campbell*, 116 U. S., 418;

that the proof varied from the pleadings, when the objection might have been obviated if taken below.

Roberts v. *Graham*, 6 Wall., 578.

It is natural that the rule here contended for, that defects in pleading to which objection is not made in time to permit the correction of the defect by amendment, are waived, should be applied in the great majority of cases where the appellant, after failing to object in time, seeks to deprive the appellee of his judgment because of such defects. It is obvious upon principle that the appellant has the same right to claim the benefit of such a waiver as the appellee, and the rule was so applied in the case of

Dunn v. *Durant*, *supra*.

Instances of the application of the rule might be multiplied indefinitely without making it clearer. In the case at bar, the allegation criticised by the Circuit Court of Appeals, following the quotation from the by-laws, should be taken as stating that the death was "caused or superinduced" by the violation of the criminal law preceding it. *So the plaintiff's counsel understood it*, for no demurrer was filed to the answer, no objection was interposed to the evidence tending to show death caused or superinduced by violation of the law, nor was any instruction asked excluding this defense. *So the trial court understood it*, for it undertook to instruct the jury as to the meaning of the clause of the certificate under which this defense was asserted—though erroneously, as we shall show further on.

We do not wish to be understood as asserting that this paragraph of the answer would have been good on demurrer. When the adversary party calls attention to the uncertainty and indefiniteness of a pleading, he is entitled to have it amended, so as to aver with needful certainty and precision the cause of action or the defense which will be maintained on the trial. The rule, however, is otherwise, on grounds of manifest propriety, where he makes no objection to the defects of the pleading but accepts it as stating a good cause of action or defense, and then, after verdict and judgment, attempts to avail himself of those defects, to reverse a proper judgment against himself or retain the benefit of an improper judgment in his favor, on the ground that his adversary has not properly stated in his pleadings the state of facts which his evidence tended to establish and did establish. He is excluded from taking advantage of such defects on the plainest principles of estoppel.

The only case cited in the brief of defendant in error in the court below to sustain the judgment of the trial court, in so far as that judgment disregarded the defense of death caused or superinduced by violation of the law, absolutely established by the evidence, if the case was not one of suicide, was the case of

Conroy v. *Assn.*, 17 Ind. App., 62; 60 Am. St. Rep., 154,

the decision of an intermediate Appellate Court. That was a decision on demurrer to the answer, which failed to state facts showing a violation of the statute relied on. The deceased might have been doing all that was alleged, and yet not have violated the statute pleaded. The demurrer was manifestly well taken and should have been sustained, and the Appellate Court rendered the only judgment which it could render, in reversing and remanding the case. But if the

plaintiff had waived the defect of the answer and had gone to trial, would he have been heard to say, after judgment for the defendant on evidence showing a plain violation of the statute and the necessary causal connection between that fact and the death of the assured, that the defense so established was not properly pleaded? Most certainly not. Nor would a verdict and judgment, against the uncontradicted evidence of such a violation of the statute, have been allowed to stand, merely because the defense was unskillfully pleaded. The plaintiff having been advised that that defense would be relied on and having waived the formal defects of the plea, would be held to have accepted it as a good plea, or, as it is sometimes phrased, the plea would be construed as if it had been amended at the trial.

We earnestly insist that, under the provisions of the Montana Code, as well as under the enlightened conceptions of justice which actuate this and other American courts in the consideration of defects in pleading which have not been objected to at the proper time and in the proper manner, the unskillful statement of this defense should not prejudice this defendant. A "liberal construction" of this paragraph of the answer must sustain it; for no intelligent person who reads it in connection with the evidence, or even without the evidence, can fail to understand that what the pleader intended to aver was that the defendant was not liable because the death of the assured was caused or superinduced by the violation or attempted violation of the law. So it is impossible to say that the variance between the allegations and and proof has "misled the plaintiff to her prejudice," for she was a witness in part of the very facts on which the defense rests and knew all of them from others. Nor can it be said that any "substantial right" of the plaintiff has been infringed by this defect in pleading. Judged by any

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standard acknowledged by the rules of modern pleading, this answer, after the plaintiff went to trial without objection, is sufficient as a statement of the defense actually proved.

This assignment of error was also held bad by the Circuit Court of Appeals on the ground that "while the evi-"dence showed that very shortly prior to the time that he "was killed, he was engaged in unlawful acts, it did not "show with sufficient clearness that *he was so engaged at* "*the time he met his death* as justified the court in taking "the case from the jury."

The only interpretation that can be put upon this language is that unless the death of the insured occur at the very moment that he is doing an unlawful act, the defendant is liable. Must the thief be in the very act of removing the money from the till, the murderer in the very act of plunging his knife into the body of his victim at the time of his death, in order to afford to this defendant the exemption which it has most justly and wisely sought to obtain for its members from the enormous risks which would be incurred by an insurer of the lives of criminals? The very statement of the theory bears its own refutation. A person is engaged in the violation or attempted violation of the criminal laws from the moment that he takes the first active step to perpetrate a crime until he has finally and completely desisted from it. It may be difficult in a particular case to tell just when this moment occurs; but there can be no difficulty in this case. Beck had been for three hours at least intent upon the commission of some criminal offense; he had not desisted from the attempt when he met his death. He had, an instant before, made a felonious attack upon an inhabited dwelling house at night, an attack which would have justified his killing by anyone in the house; he had threatened on his second visit to kill his wife and had

returned to the house with a deadly weapon with the apparent purpose of carrying out his threats, and on the arrival of the officer he had not fled from, but had concealed himself on the premises. *The left barrel of the gun was loaded and cocked when found by his dead body.* Is it possible on such a state of undisputed facts to say that Beck was not engaged in the violation or attempted violation of the criminal law when he met his death?

But to exempt the defendant from liability, it is not necessary that the deceased should *have been engaged in the commission of a crime at the time of his death.* All that is required is that his death shall be "caused or superinduced" by a violation or attempted violation of the criminal laws. Can there be a doubt that Beck's death was "caused or superinduced" by such a violation or attempted violation? His presence on the premises, the hour at which he was present, his possession of the gun, his situation at the time of his death—every fact which contributed to his death, on the theory of accident, was a part of his criminal enterprise.

The court was tendered and refused the following instructions as to this defense (assignments of error XIV and XVI):

"That if the jury find that Frank E. Beck's death occurred while violating the criminal laws of the State of Montana, or while in an attempt at the violation thereof, no matter what they believe was the cause of death, suicide or accident, the plaintiff cannot recover under this policy, and you will find a verdict for the defendant."

"If Beck died while attempting to or while violating the criminal laws of the state, plaintiff has no claim under the contract between Frank E. Beck and the defendant that would entitle her to a verdict, and you are instructed if you find he was attempting to violate, or was violating the criminal laws of this state at the time of his death, the plaintiff cannot recover, and you will find for the defendant."

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In rejecting these instructions the trial court said to the jury (assignment of error XXIX):

> "Here is an instruction asked which I refused, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed, he cannot recover. But if a man, contemplating that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply."

We do not know upon what grounds the learned judge proceeded in so narrowing the meaning of these words. It is sufficient if the death is "caused or superinduced" by the violation or attempted violation of the criminal law. Can any one say that the death of a criminal is not caused by his violation of the law unless he is killed by some one else in resisting the perpetration of the crime? If Beck had fallen in attempting to climb to a second story window for the purpose of effecting an entrance there, instead of breaking a window on the ground floor, or if he had stumbled into an unguarded well on the Nolan premises while prowling around the house with a felonious intent, could there be any doubt that the crime was the cause of his death? If, after breaking into the house he had eaten poisoned food found there, would not his crime be the cause of his death? These queries seem almost simple; yet the very act by which death ensued in this case was not less directly the result of the criminal intent of Beck than the act stated in each of these supposed cases. But the jury were instructed by the court that the paragraph on which this defense was based had no

application to such a case, so that, without wholly disregarding the instructions of the learned judge, the jury could not have returned a verdict for the defendant on this defense, although the evidence was overwhelming,—indeed, uncontradicted,—that Beck's death, if not due to suicide, was caused by a violation or attempted violation of the criminal laws of Montana.

This defense was also excluded from the case by that part of the charge as given which stated: "The investigation "narrows itself down to the question as to whether the death "of Frank E. Beck was an act of suicide, whether voluntary "or involuntary, while sane or insane, or whether it was "accidental." (Assignment of error XXII.)

The character of the exemption provided for by this clause has been interpreted in a very able opinion in the New York Court of Appeals.

Murray v. *Life Ins. Co.*, 96 N. Y., 614.

There the clause was "in or in consequence of the violation of the laws." The assured, in company with his brother, had made a brutal assault upon one A, who drew a pistol, by which the insured was shot, accidentally, as A testified. It was held that the insurer was not liable, the court saying:

> "It is said that the shooting was accidental and not voluntary or intentional, and consequently was not a death in or in consequence of a violation of law. What incidents would attend the assault could not be foreseen. They probably did not know that A had a pistol, and if they had known it, they could not have anticipated that it would be discharged in the manner stated by him. But they took the risk of his resistance to any extremity. *They took the risk of any injury which might happen to them in consequence of his handling a deadly weapon, whether such injury was intentional or accidental.* * * * If the killing under the circum-

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stances was not an unnatural result of the attack, the case is within the condition. Assuming * * * that the killing was accidental, yet the accident was the result of the struggle of A to free himself from the grasp of the brother of the insured, and the jerking of his arm by the latter. The accident, so-called, was caused by the assault, and the risk of injury from the discharge of the pistol was occasioned by the criminal act of the Murrays."

The learned Judge also gave various illustrations of death which would fall within this proviso, such as death incurred in prize-fighting or death due to the deceased falling from a housetop, or jumping from it to escape detection, while committing a burglary, or death due to the bursting of a blood vessel, occasioned by the excitement of an affray in which the deceased had voluntarily engaged.

"*It is sufficient to bring a case within the condition if there is such a relation between the act and the death that the latter would not have occurred at the time if the deceased had not been engaged in the violation of law.*"

"A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy, if the natural and reasonable consequences of the violation are to increase the risk."

Bloom v. *Franklin Life*, 97 Ind., 478.

"While the unlawful act of the assured must tend in the natural line of causation to his death, in order to work a forfeiture, it is not necessary that the act should be the direct cause, nor that the consequences which actually followed could have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for in such a case the ultimate result is traced back to the original proximate cause."

Ibid.

Where the deceased was killed while walking on a railroad track which was forbidden by law, it was held that the company was not liable.

Neill v. *Ins. Co.*, 31 Up. Can., C. P., 394.

So where the deceased died in consequence of an operation intended to produce an abortion, it was held that the company was not liable.

Hatch v. *Ins. Co.*, 120 Mass., 50.

So, where the assured was driving in a race and sprang from his sulky after a collision and was knocked down and killed while pursuing his horse, the company was held not liable, racing being forbidden by the law of the state.

Insurance Co. v. *Seaver*, 19 Wall., 531.

So an accident insurance company has been held not liable for an injury sustained by the insured falling while returning to his home from hunting on Sunday, the statutes forbidding both travelling and hunting on that day. The provision of the policy was against liability for an injury "resulting wholly or partly, directly or indirectly" from a violation of law.

Duran v. *Life Ins. Co* (Vt.), 22 Atl., 530.

Conclusion.

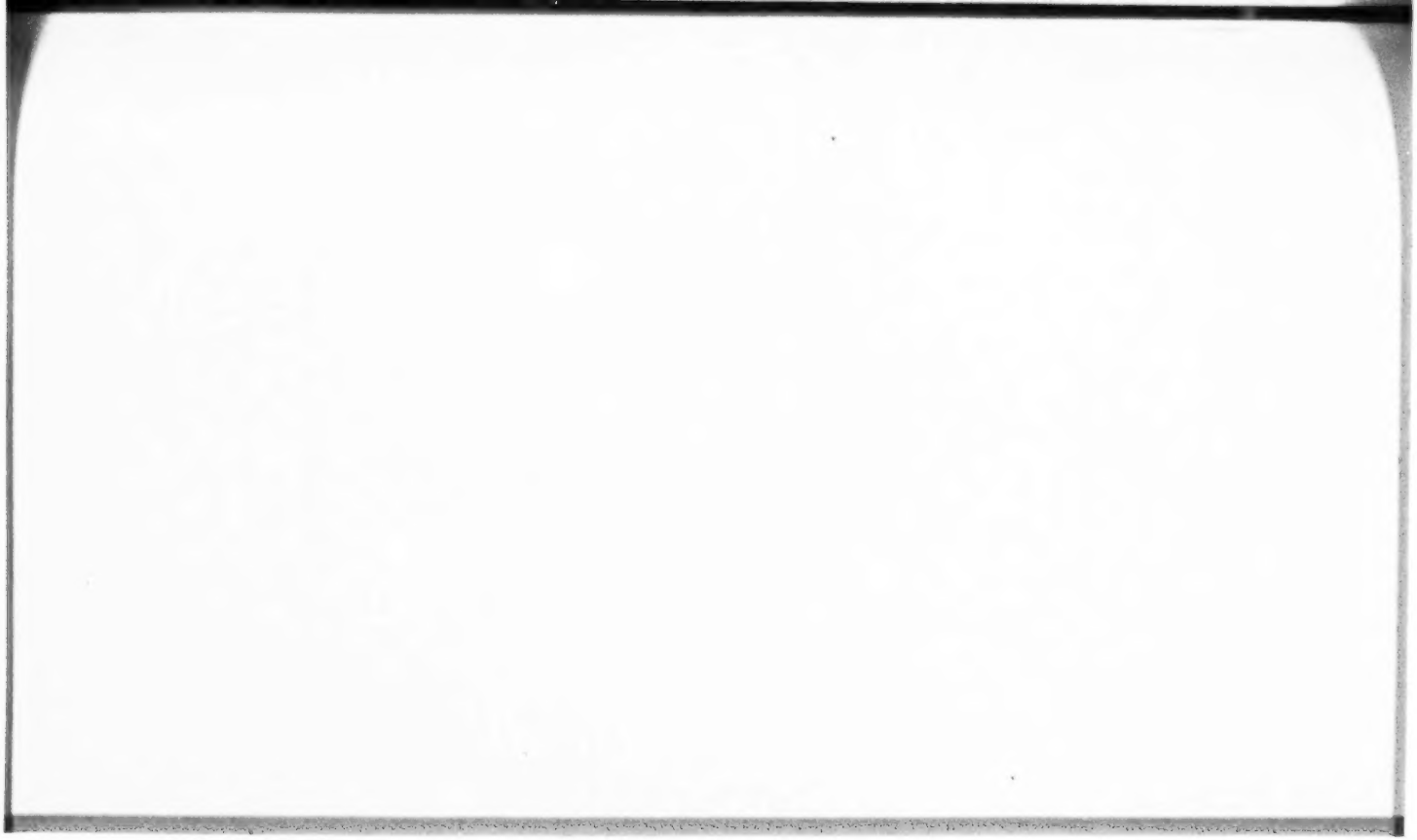
We believe that every assignment of error which has been argued is of such a serious character that, standing alone, it would call for the reversal of this judgment. Standing together and infecting the trial with error at every stage, their effect is, we respectfully submit, irresistible. The testimony admitted over our objection was the only evidence or semblance of evidence in support of the plaintiff's theory; that re-

jected was an essential part of our defense or a complete impeachment of the plaintiff's theory. The refusal of our instructions as to the *prima facie* case made by the admissions of the plaintiff in her proofs of loss, thereby casting the burden upon the plaintiff of breaking down that *prima facie* case, was also a vital error. The same is obviously true of the court's refusal of defendant's instructions in regard to the defense of violation of the law and of the instructions given by the court on this subject, wrong in law and, under the circumstances of this case, absolutely destructive of that defense.

We insist further that, without regard to the errors in the admission or rejection of evidence or in the court's statement of the law, the error of refusing to instruct the jury to return a verdict in favor of the defendant entitles us, not only to a reversal of this judgment, but to a mandate to the trial court directing the entry of the judgment which the court should have entered. The counsel who tried the case and argued it to the Circuit Court of Appeals, relying doubtless on the strength of his case, did not present the evidence to the court with that fullness which we have deemed proper in this court, and the curt disposal of that assignment of error by the intermediate court, without discussion or statement of the evidence which in the court's opinion justified the trial court in submitting the case to the jury, would seem to indicate that the record received but a scant examination. While we have endeavored to state the whole evidence fully and fairly, we respectfully urge upon the court a careful examination of the evidence itself as found in the record, as confirming in every way our contention, that the theory of accidental death rests on mere surmise, a surmise which is contradicted by every fact in evidence and which is absolutely irreconcilable with many of the facts established beyond dispute.

This case was fully tried and the testimony of every person having any connection with the facts was heard by the jury. The only effect of granting a new trial would be to subject the defendant to the hazard of altered testimony and of the death or absence of its witnesses. We therefore pray that, if our assignment of error on this point is sustained, the trial court be directed to enter up a judgment for the plaintiff for $138 and no more.

CARLOS S. HARDY,
Attorney for Plaintiff in Error.



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IN THE

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OCTOBER TERM, 1900.

THE SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD, PLAINTIFF IN ERROR, v. LILLIAN H. BECK.	No. 194.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

No point made in the brief for plaintiff in error is answered in brief for defendant in error in such a manner as to call for a reply. We however desire to notice the statement repeatedly made in brief for defendant in error that the gun produced in court and used by defendant in error in the experiments before the jury was produced by the plaintiff in error as the gun with which Beck killed himself. There is not even the shadow of evidence in this record to sustain such a contention. A gun was handed to a witness for plaintiff in error in order that he might illustrate the manner in which the deceased was supposed to have committed suicide. No evidence whatever was

produced to establish that this was the gun with which Beck was killed, nor could the jury infer from the evidence given by the witness that such was the fact. It does not appear from the record who brought this gun into court. The present counsel for plaintiff in error was not present at the trial, and has no knowledge upon this subject. He is dependent, like the court, upon the record for his knowledge of the testimony given there. There is absolutely no evidence in this record that the gun was conceded to be the gun with which Beck killed himself. On the contrary, that pretence was disputed at the first opportunity, when the misleading experiment was made by the brother of Beck. What the fact is as to the gun used on this trial we have no means of knowing. It may have been a gun brought into court by the defendant in error, and used by plaintiff in error in illustration of matters not depending in any way on the particular kind of gun used, or it may have been a gun selected at random by the plaintiff in error for that purpose, and then adroitly used by defendant in error for the purpose of misleading the jury, because of its unusual length. But it was certainly not produced by the plaintiff in error as the gun with which Beck killed himself, and that theory was strenuously opposed as soon as made.

Respectfully submitted,

CARLOS S. HARDIE,

Attorney for Plaintiff in Error.

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OF PYTHIAS OF THE WORLD,
Plaintiff in Error,

vs.

LILLIAN R. BECK,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

C. B. NOLAN,
Attorney for defendant in error.

L. NAEGELE & SONS, Printers, Helena, Montana.

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BRIEF FOR DEFENDANT IN ERROR.

The errors complained of will be considered in the order in which they are presented in the brief of plaintiff in error.

I.

The record discloses that Mr. Beck was a periodical drinker, and that while under the influence of liquor he was abusive. In consequence of this abuse his wife threatened to leave him. It was only during those

periods of intoxication that family disturbances occured. One of these disturbances occurred about six weeks before his death, but a reconciliation was effected which continued without interruption until a drinking bout took place four days before his demise.

There is some evidence that during the period of three years, (1893–4–5) on two particular occasions, when the servant called his attention to the fact that he was drinking, he remarked in one instance that "a man that had as much trouble as he had the sooner the end came the better", and in the other instance that, "a man that had as much trouble as he had would be better off dead than living". These remarks were made in the early part of March 1895. If they indicated an intent to terminate his existence, surely opportunities innumerable must have presented themselves during the period of eighteen months, from March 1895 till October 1896. The record shows that during this time pistols and knives were within his reach, better fitted to accomplish self destruction than a gun. It is true that he stated that unless his wife lived with him he would kill her, and at Nolan's residence about an hour and a half before his death he stated that if she did not come out he would kill her. It will be noticed that the statements as to the killing are conditional, but even if unconditional they do not necessarily suggest suicide.

If Mr. Beck on the night of the 31st of October intended to kill his wife, or intended to commit suicide, why should he use a gun to do this, when a revolver would be far more serviceable, and the record shows that he was not without a revolver, and indeed if he were, no doubt one could be borrowed equally as well as a gun. If such were his intention for what earthly reason was his partner asked to accompany him? With

a gun in his possession concealment of intention was impossible. With Mr. Votaw along there was a strong probability that an attempt to commit murder would be frustrated. Besides it is not an *established fact* that on the evening of the thirty first Mr. Beck was intoxicated or excited. Mr. Votaw says that when he went to Nolan's house he seemed to be all right; he did not seem to be under the influence of liquor; he seemed to be perfectly rational; seemed to be a little troubled-worried. (36) Of course, he was. He was exceedingly attached to his wife. In his last drinking bout he had disregarded the promise that he had made to her, and was unduly anxious to effect a reconciliation, as he had theretofore done. Mr. Reece testifies (32) that he knew Frank Beck in his life time, and that he drank, but that on the night of the thirty first he did not think he was under the influence of liquor. It is true when he was refused admission into Nolan's residence he became angry, and tried to force an entrance, but we are not justified in supposing it was his purpose if he effected an entrance to kill his wife and himself, for as already stated Votaw was there to prevent this. Indeed, the record shows that at this time he was not in the possession of the gun at all.

It is asserted that a homicidal mania was exhibited in procuring the "Doughty" gun. Is it an established fact that the gun was procured for criminal purposes? The record shows that the Beck family had a propensity for hunting. *Not for human victims as plaintiff in error would readily conjecture.* Six weeks before the thirty first of October two guns were taken to Elliston for hunting purposes. Elliston was a place to which he was in the habit of going. There is no particular reason why we should not conclude that he had Elliston in view when he spoke about hunting in connection

with the Doughty gun. At any rate, *it is not an established fact that he had Mrs. Beck in mind when he used this language.* If this were so, and his intention was bonafide, I ask again, at the risk of repetition, why announce it from the house tops, and why use such a weapon as a gun?

There is no warrant for the statement that Beck was *violently passionate* immediately preceding the fatal act. He was violently passionate at the time that he attempted to force the door. This was in the neighborhood of seven o'clock. And we will admit that he was violently passionate when he broke the window, if he did so. This is largely conjectural. How much time elapsed after the latter act before the fatality occurred? You are invited to engage in guess work. The plaintiff in error could remove this question from the domain of speculation by proof upon the trial. For some purpose known to itself it declined or neglected to do so.

The nature of the wound, the impress of the gun barrel, the absence of powder burns, the position of the body and the testimony of Gordon are all consistent with the theory of the accidental discharge of the gun, and some of them are TOTALLY INCONSISTENT with the theory of suicide in the light of the evindence adduced upon the trial. There only remain of the established facts discussed in the appellant's brief the *fear of arrest and punishment* and the *universal opinion shared by Mrs. Beck and her attorney that death was due to suicide.* As to these, suffice it to say that the institution of a suit controverts the latter, for we must indulge in the presumption in the absence of proof that recourse to perjury would not be indulged in to make recovery possible. Besides, if such a belief were entertained by Mrs. Beck or her attorney, it is apparent

that it rested exclusively on rumor and supposition. As to the fear of arrest and punishment if this motive actuated suicide, why was it necessary to leave the water closet to discharge the gun?

But why prosecute this inquiry further. It is profitless to indulge in speculation. Beyond the record in this case there is no need to go, and from this record no other verdict could be rendered than that which was rendered. Whatever may have been the motive that impelled Mr. Beck to demean himself as he did on the night of the thirty first of October, it is absolutely certain that his life was extinguished by the accidental discharge of the gun. *And, first as to the gun itself.* The gun used upon the trial was undoubtedly the gun used by Mr. Beck. Why? Where did this gun used upon the trial come from? The record shows that it came from plaintiff in error (26). It was used to illustrate how the killing was effected, and how the mark found upon the body was inflicted. By general consent it was conceded to be the gun with which the killing was done. If this were not the gun why should Lindner be permitted to examine it to testify whether or not by concussion or shock it could be discharged? Instead of a request to experiment in court with the gun the suggestion would be made that this was not the gun with which the killing was done. Surely the plaintiff in error knew where the gun came from, and its silence in this regard is conclusive as to the identity of the gun. It is true that objection was made when Oscar Beck used the gun to show that it could not be discharged without the aid of some foreign object, *because it was not shown that it was the gun with which the killing was done.* Surely objection of this kind coming at the time when it did was trifling with the court. The gun was brought in to court by the

plaintiff in error, and was used up to that time apparently as if it were the gun that was used with fatal effect on the night of the thirty first. If this weren't the gun, it was a duty incumbent upon the learned counsel for plaintiff in error to so state after introducing the gun into the case. He could have told or shown where it was obtained so as to eliminate from the case every element of doubt on this point. There was a studied attempt to create confusion in the minds of the jurors when the theory of sucide was exploded through the testimony of Doughty (31) and Hilda Berg (33) about long guns and short guns. Instead of this why was there not evidence directed to the gun used upon the trial as to where it came from? The statutes of Montana tersely express a principle of evidence of universal application.

"That evidence wilfully supressed would be adverse if produced".

"That higher evidence would be adverse from inferor being produced".

Code of Civil Proc., Mont. Sec. 3266, Sub-divisions 4 and 5.

In this case then it must be considered as an established fact that the gun used upon the trial was the gun with which the killing was done.

Mr. Flaherty, the undertaker (26) testified as follows: "I noticed that there was a mark under the left eye * * * the skull was blown from the scalp, there were no powder marks upon the face * * * in my opinion the death of Frank E. Beck was caused from a gun shot wound; in my opinion judging from the marks upon the body of Mr. Beck and the absence of powder marks the gun was pressed against the body at the time it was discharged; the cause of the circular mark

which I have mentioned upon the face of Mr. Beck in my opinion was the impression of a gun barrel * * * (gun is produced by attorney for defendant and witness requested to illustrate to the jury how the mark could have been made). If you had a gun set on the ground with a man holding his face on the barrel thus (witness illustrates) it would leave a mark as I have described * * * The stock of the gun was placed upon the ground and Mr. Beck pressed forward pressing his eye against the barrel of the gun making the mark I have already referred to and stooping down and discharging the gun".

We have here the theory of suicide, and the only theory that was advanded by the plaintiff in error as to the manner of Beck's death.

Upon Cross-Examination (27) the witness testified as follows * * * "My theory is that it was pressed against the face when it was discharged (the gun).

Q.—Are you prepared to say that this mark was not occasioned by the pressure of the skin upon this bone?

A.—I am prepared to say that the mark was caused by the pressure upon the skin of a barrel of a gun * *. My theory is that the gun was put on the ground like that—just like that (witness indicating by placing the stock of the gun on the floor and pressed against his left eye) and then the trigger was touched and the gun went off * * *. My arm isn't long enough but I could do it with that pencil.

Q.—And if you were there it would be necessary for you to use a pencil or stick of wood or something to get the gun off?

A.—Yes, Sir. I don't know how my arms compare with Mr. Beck's arms. If his arms were the same lenghth as mine it would be necessary for him to send the gun off with a pencil or stick of wood * * *.

The witness was recalled after the defendant had rested, and testified as follows (28): "I do not pretend to say that the mark could not be occassioned in any other way than placing his head upon it. It would require some little time to get the gun down in the manner I give you to understand it was placed this morning; It would take some little time for him to get his face in shape and to get the gun down and a pencil or stick to get the gun off if his arm wouldn't reach. And if the evidence showed in this case that the man having the gun stepped from a water closet on to a walk and the gun was accidentally discharged by coming into contact with the walk it of course is *possible that the death of Beck might have occurred by his falling on the gun if the gun was discharged simultaneously with his head striking the barrel*, and under the circumstances that might occassion the mark there. I gave you to understand that the gun was resting against the eye this morning. I gave you my theory but stepping down and falling upon the gun would make a mark like that * * *."

If this were a suicide with the mark existing as it did considerable time would be consumed in adjusting the gun and the gun could only be discharged by stooping so as to reach the trigger. The theory was a good one were it not for the difficulty experienced in discharging the gun. To make the theory tenable it was necessary that a pencil or stick of wood should be used. But nobody pretended to testify that these aids were called into requisition. *The proof conclusively shows that the killing did not take place in this way.* The rapidity with which the discharge of the gun followed the exit from the water closet left available no time for fixing and discharging the gun as testified by Mr. Flaherty.

Grant Gordan testifid as follows: (37 and 38) * * * It was so dark that you could not see for a greater distance than fifteen or twenty feet * * * I saw him walking towards the closet and saw him step into the closet * * * after he walked around the closet he stood there perfectly still then he seemed to step out of the water closet * * * and the gun was then discharged * * *. I say that in my judgment he went into the water closet judging from the sound of his footsteps * * * then there was a sound indicating that he left the water closet and immediately after hearing these sounds of moving the gun was discharged * * * just as he stepped out the gun was discharged * * *."

From this testimony there is no time furnished for getting the gun upon the ground and pressing the left eye upon the barrel. There is no time available to hunt a pencil or stick to facilitate the discharge of the gun. If suicide were intended there was no need to leave the closet. *Is it not more likely that the closet was entered for the purpose of concealment and the presence of the officers in the neighborhood of the closet made it desirable to secure some other place of concealment in the darkness?* Which is the more likely, under the circumstances, the accidental discharge of the gun or the intentional discharge of it? The night was exceedingly dark. There was a step leading from the closet to a plank walk. The gun held in the hand might be used to steady the body or prevent it from falling, if a step were taken from the closet to the walk inadvertently. It is possible that the eye might come in contact with the barrel if the gun were used in this way so as to cause the mark under the eye, and if a discharge of the gun followed from concussion the body would be in identically the same situation as if

the gun were intentionally discharged, in conformity with the theory of the defense. In the case of an intentional discharge the body would not be in a more recumbent position then if an accidental discharge took place. The experiments conducted before the jury showed this, and the testimony of Mr. Flaherty (28) leaves no room to doubt but that death was the result of the accidental discharge of the gun.

The burden of proving suicide rested with the plaintiff in error. The proof adduced precluded the possibility of the suicide theory and establishes beyond a reasonable doubt that death was due to accidental causes.

If there is any evidence to sustain the verdict this Court will not inquire as to its sufficiency. It is only where there is no evidence that an appelate tribunal will interfere.

Hyde and Oglesby vs. Stone, 20 How., 170.

Lancaster vs. Collins, 115 U. S., 222.

Chicago and N. W. R. R. Co. vs. Ohle, 117 U. S., 123.

Loewer vs. Harris' administratrix, 14 U. S. App., 615.

Insurance Co. vs. Johnson, 37 U. S. App., 413.

II.

The ruling of the court in excluding an offer of proof while Mr. Doughty was testifying is complained of.

This witness was resorted to to mystify the jury concerning guns. It was undoubtedly competent to show that a gun was obtained by Mr. Beck, and if the witness were competent to do so, to describe with par-

ticularity the gun borrowed. Whether the Doughty guns were short or long was immaterial except in so far as the evidence might show if the killing was done with the borrowed gun that such gun was a shorter gun than the one with which the experiments were made, and in the offer of proof there was no pretense that a comparison of guns with this object in view was intended. The evidence in the record shows unqualifiedly that the Doughty gun was not used by Beck on the night of the thirty first. The testimony of Hilda Berg (33) is obscure upon this point. The testimony shows that the gun with which the killing was done was turned over to the coroner, from whom no doubt counsel for plaintiff in error obtained it.

Oscar Beck testified on this point (38) as follows:

"I know of a gun that was taken from Mr. Doughty's a short time before my brother died. I first became aware of it in my brother's house after his death. I think I found the gun in the dining room of my brother's house after his death. I returned it to Mr. Doughty to the store there to a man in charge of the store, and Mr. Doughty was there at the time; this was shortly after my brother's death—I don't know how long. It was not the Doughty gun that terminated the life of my brother".

If this is true, and there is no evidence to contradict it in the record, then how could the exclusion of any evidence regarding the guns that Doughty had in stock be of any materiality? The learned counsel in his brief, discussing this feature of the case says: "That a gun of unusual length was introduced into the court room and it was never proved that this was the gun with which Beck killed himself." Introduced by whom? Why sir, where did you get this gun of unusual length? And if it were not the gun with which the

killing was done surely you were in a position to show this. Such argumentation in the light of the facts before us borders on frivolity.

Doughty testifies that he was not present when the gun was borrowed. Why was not the person secured from whom it was borrowed? Doughty was present when the gun was returned. Now mark the line of inquiry in the face of this proof (31).

Q.—"What character of guns did you carry in stock there?"

"I object to the question for the reason that it is incompetent, irrelevant and immaterial what kind of guns he kept".

By Mr. Loeb.—"I desire to offer to show by this witness that he had in his possession several lengths of guns and some are what is called the Belgian gun. Some are long barreled guns and some are short barreled guns, and so far as the recollection of this witness is concerned he does not know whether it was a long or short barreled gun that was *borrowed* by Mr. Beck."

It must have been apparent to the court that there was no frankness in this offer. It is true that witness had no recollection as to whether it was a long or short barreled gun that was borrowed. It could not be otherwise, as he was not present when the loan was made. He was present when the gun was returned and no doubt had a recollection as to that gun. Yet no question was asked as to what the length of the gun that was returned was or how it compared in dimensions with the gun in the court room.

III.

Mr. Lindner testified (39 and 40) as an expert in the handling and discharging of fire arms and after examining the spring of the trigger he expressed the opinion that if the trigger were raised the gun could be discharged by a sudden shock. Upon cross-examination the witness was invited to make a test before the jury. This was disallowed upon objection being made, and this ruling is claimed to be erroneous.

In the first place such a request was not warranted as within the scope of a proper cross-examination.

Code of Civil Procedure, Montana, Sec. 3373.

The judgment of the witness was based upon the tension of the spring. Without any testimony at all upon the point it is a matter within the judicial knowledge of the court that a gun can be discharged by a shock, unless locked, and in this instance there is no pretense that such was the case.

Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction.

Summerton vs. Columbian Insurance Co., 37 N. Y., 174.

A court will notice judicially anything in the common knowledge and use of the people throughout the country, as things that must happen according to the laws of nature.

Brown vs. Piper, 91 U. S., 42.

Experiments in the presence of a jury are generally discountenanced.

Thompson on Trials, Sec. 620.

The matter of the allowance or disallowance of experiments is largly within the discretion of the court.

Ball vs. U. S., 163 U. S., 662.
U. S. vs. Reed, 42 Fed., 134.
People vs. Levine, 85 Cal., 39.
Homan vs. Franklin Co., 98 Ia., 692.
Ord vs. Nash, 50 Neb., 335.
Leonard vs. Southern Pac., 21 Oregon, 555.
Heath vs. State, 91 Ga., 126.

The test invariably is will the evidence tend to enlighten the jury and enable them the more intelligently to consider the issues presented.

Burg vs. Chicago etc. R. Co., 90 Ia., 106.
Boyd vs. State, 14 Lea., 161.

There where no limitations as to the test that was to be applied. The witness was asked in a general way to subject the gun to a shock. If the surroundings were the same as on the night of the thirty first of October some good might result from the experiment.

Experiments to be admissible must be based on conditions similar to those existing in the case on trial.

Eidt vs. Cutter, 127 Mass., 522.
Leonard vs. Southern Pac. Co., supra.

Where an experiment is offered to prove a fact or theory already established by the testimony, the allowance or disallowance of such experiment is not error of which either party can complain.

Am. and E. E. of Law, Vol. 12 (2nd edition), 401.
Osborne vs. Detroit, 32 Fed., 36.

If the judgment of the witness as to the possibility of the discharge of the gun was erroneous this fact could be established in the regular, legitimate manner by *expert testimony as to a different state of facts.*

The ruling of the Court was strictly correct, and under no conceivable combination of circumstances could the failure to permit this experiment prove prejudicial to the defendant.

IV.

Error is suggested on account of permitting Oscar Beck to try to reach the trigger of the gun, after placing himself in relation to the gun in the situation which Flaherty said it was necessary that he should be placed to cause an intentional discharge of it (38).

This was done after witness had testified that he had longer arms than his brother. Objection was made because the identity of the gun was not established. This feature has been so extensively discussed heretofore that further comment is avoided.

Assuming for the sake of argument that it was not the gun its use under the circumstances was justified on account of its use in the same manner by Mr. Flaherty.

As already noticed, the gun was undoubtedly Beck's, and its use in the manner indicated was authorized.

V.

This alleged error is on a par with its predecessors. Proofs of death were presented, signed by the plaintiff in which the acknowledgement was made that death was due to suicide. She was subjected to a searching cross-examination and exhibited commendable frankness in stating that she did not know whether it was a case

of suicide or accidental death. The following question was then put, the disallowance of which is made the basis of error.

Q.—Is it not a fact Mrs. Beck that you have stated to a great number of persons in speaking about this case that there was no question but what Mr. Beck committed suicide but that the company could not prove it?

If any benefit could possibly be derived from the proof of such a fact the fact was established by the proofs of death.

Besides the allowance of such a question was in direct violation of section 3380 of the Code of Civil Procedure of Montana, which provides:

"A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony, but before this can be done the statements must be related to him, with the circumstances of time, places and persons present, and he must be asked whether he made such statements, and if so allowed to explain them. If the statements be in writing they must be shown to the witness before any question is put to him concerning them."

Testing this question by the positive requirements of law it is signally lacking in essentials, and its exclusion was correctly ordered.

Complaint is made that the learned Circuit Court of Appeals did not specifically consider the rulings of the trial court on the admission and exclusion of evidence. Considerable space in the brief of the plaintiff in error is devoted to their consideration. We respectively submit that the principles of law that have application are elementary, and the claims of the learned counsel for plaintiff in error in reference thereto are without foundation in reason or authority.

VI.

The sixth assignment of error involves a consideration and discussion of the law as to the burden of proof and the effect of admissions such as here confront us affecting the burden of proof.

The authorities without exception hold that the burden is upon the company.

Niblack Benefit Societies and Accident Insurance, Sec. 326.

Lanysken vs. Traveler's Insurance Co., 52 Pac. 1040.

Carnes vs. Iowa State etc. Association, 106 Iowa 281.

Standard Life and Accident Insurance Co., 100 Fed., 582.

Preliminary proofs are admissible as prima facie evidence of the facts stated.

Insurance Co. vs. Newton, 22 Wall, 32.

Bachmeyer vs. Mutual Reserve Fund Life Association, 82 Wis., 255.

Goldsmith vs. Mutual Life Insurance Co., 102 N. Y., 486.

Home Benefit Association vs. Sargent, 142 U. S., 691.

Sharland vs. Washington Life Insurance Co., 101 Fed., 206.

Hannah vs. Conn. Mutual Life Insurance Co., 150 N. Y., 526.

As shown by the instructions asked for, set forth in the assignment of errors, the defendant's theory was

that on account of the admission in the proofs of death the burden of proof shifted; this position is now conceded to be erroneous.

Under the authorities herein set forth and in conformity with the principles of law now conceded to be correct the law was enunciated by the learned trial judge. Instance the following:

"The defendant has offered in evidence the proofs of death of Frank E. Beck and has also offered in evidence the testimony of the witnesses at the coroner's inquest and the verdict of the coroner's jury. This evidence under the law it is proper for you to consider, but you are instructed that it is not conclusive upon the plaintiff, nor is the plaintiff estopped from showing a condition different from that suggested by such proofs of death or verdict."

"You are instructed that in considering this evidence you must do so in the light of the explanations made by the plaintiff and in this connection you are at liberty —nay more, it is your duty, to consider whether or not the conclusion set forth is warranted by the evidence upon which such conclusion is based, for after all it is for you to say whether or not upon the evidence plaintiff was justified in saying that the death was intentional rather than accidental, and so likewise is it your duty to say whether the coroner's jury on the evidence before it could consistently find that the death was suicidal rather than accidental. In considering this feature of the case it is not only your duty to consider the verdict of the coroner's jury, but also to consider the evidence which was adduced before that coroner's jury. So likewise it is your duty not merely to consider the proofs of death furnished to the company, but it is your duty to consider the circumstances surrounding the presentation of such proofs and the evidence which the plaintiff had respecting the question as to whether the death of Frank E. Beck was accidental or intentional at the time she signed those proofs of death, and in this connection it is proper for you to consider as to where she was at the time the gun was discharged

and whether she could see her husband at that particular time, and if upon the whole evidence with explanations offered as to how those proofs came to be submitted and considering all the evidence in the case now before you you are not satisfied by a preponderance of the evidence that Frank E. Beck did kill himself intentionally then I tell you that under those circumstances the plaintiff is entitled to a verdict and your verdict should be so declared."

"The declaration of the plaintiff in her statement as to the cause of the death of her husband Frank E. Beck has been admitted in evidence in this case. This admission or declaration was to the effect that said Beck had committed suicide while insane. If this admission was not overcome or counter-balanced by other evidence in the cause this admission would warrant you in finding that the deceased Beck came to his death as in the statement set forth * * * ".

"It has been stated here in the argument and I told Mr. Loeb I would not give it, that when there is this admission on the part of the plaintiff that death was occassioned by suicide that then the burden of proof is shifted and it was necessary for the plaintiff to show that it was accidental. If the proofs overcome this admission and showed that it was not correct, that it was wrong, why then it should not control your action. In no case that I know of is such a rule maintained, unless by some decisions in regard to Insurance Companies. A man may admit something from a lack of knowledge upon the subject, but if it turns out afterwards that he was misinformed, that he had not any adequate knowledge upon the subject that admission may be disregarded and should be disregarded. A man is only estopped from denying his admissions and declarations when it would work a fraud upon the other party and there is no claim in this case—no claim that it would work a fraud upon the defendant in this respect."

(Assignments of error 17, 18, 21 and 30.)

These instructions although excepted to are seemingly now not considered objectionable, as they are not referred to in brief of plaintiff in error. They constitute a correct expression of the the law and the jury having been advised in this manner it was not error to refuse the instructions asked by plaintiff in errror which announced doctrines at variance with those contained in the instructions supra.

The instruction refused constitute assignments of error 12 and 13 and are as follows:

"Gentlemen of the jury you will notice that in the proofs of death made and furnished to the defendant by the beneficiary, Lillian R. Beck, the plaintiff herein under the policy or certificate upon which this suit is brought. it is stated under oath that the death of Frank E. Beck resulted from suicide. Under the law this throws the burden of proof on the plaintiff to show that the statements in the proofs of loss as to the manner of the death of Frank E. Beck were made by mistake or under a misapprehension of the facts, and unless the statements made by her in the said proofs of loss so furnished to the said defendant as to the manner of the death of Frank E. Beck are overcome by proof adduced by her showing that her husband came to his death by accident or some other causes other than suicide, the proofs so furnished stand as conclusive evidence of the cause of death of the said Frank E. Beck and you will find that he committed suicide in accordance therewith and your verdict must be for the defendant."

"The jury are instructed that as a matter of law governing cases of this character it is held that representations made in the proofs of death as to the manner of death of the assured are intended for the action of the insurance company, and upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made

under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. The burden put upon the plaintiff by the representation of suicide makes the case one where she must show that her husband did not purposely kill himself."

These instructions are misleading and incorrectly state the law. Under the law as it is conceded to be, it is only necessary to obviate the effect of the admissions in the proofs of death. The burden of proof permanently remains with the defendant. The representations in the proofs of death did not operate as an estoppel. Under the instructions asked for the burden of proof is thrown upon the plaintiff to show that the statements in the proof were made by *mistake or under a misapprehension of the facts. If this was accomplished no recovery could be had although the proof might unqualifiedly show that the death was result of accident.* Supposing Mrs. Beck on the stand testified that at the time she presented the proofs of death she knew that the statement which the proofs contained that her husband was a suicide was false and the proof unconditionally showed that death was the result of accident, under the law she would recover; under these instructions she could not. These instructions were framed under the theory that the representation made in the proofs of death operated as an estoppel, which could only be removed by showing that it was made through fraud, accident or mistake. It was only necessary to destroy the probative force of this admission to entitle her to recover, and this might be done by evidence entirely disconnected with the execution of the proofs of death or the representations therein contained. Requirements were demanded by these instructions which the law did not authorize, and the instructions were correctly refused.

The plaintiff in error in its answer neglected to interpose as a defense the admission of suicide in the proofs of death. This failure to plead such an admission did not affect its admissibility upon the trial. It was an item of evidence to be considered with other items to sustain the theory of the defense. If however upon consideration of the entire evidence the suicide theory was not established the plaintiff was entitled to a verdict. By the overwhelming weight of authority this is the law, and the instructions requested are at variance with it.

VII.

The seventh assignment of errors as noted in brief refers to the giving of the following instruction (Record page 80.)

"There is only evidence before you that he was killed by a gun discharged through his head, and whether that was done with the intent by himself to commit suicide is for you to determine. If you are unable to determine that fact, then you should find for the plaintiff, because the presumption is that he did not do it intentionally."

This instruction is objectionable from the standpoint of plaintiff in errror for the reason that the proof before the jury unqualifiedly showed suicide, and the jury should be so instructed. The learned court differed with the plaintiff in error on this point, and a calm, dispassionate consideration of the evidence in the record irresistibly leads to the conlusion that the court was correct in the views entertained. The instruction is a correct exposition of the law as announced in the cases cited.

VIII.

This brings us to the consideration of the last assignment of error, the refusal of the court to give the following instruction: "Here is an instruction asked which I refused, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he can not recover under the by-laws. As I understand that by-law it must be a case where a man is in the act of violating the law. For instance if a man in breaking into a house is killed in the act, he can not recover. But if a man contemplating that he is going to kill his wife if she did not go home with him, but was not in the act and doing that at the time he was killed that clause of the policy does not apply."

To urge now, or at any other time, that the defense embraced in the "violation or attempted violation of any criminal law" was or is interposed in this action is a work of futility. We will go further and assert that until the instruction under consideration was presented to the trial court plaintiff in error never harbored the idea of interposing this defense. Why? Under the policy if death resulted from any of the excepted causes the policy was void. It was also provided that if death resulted from any of the excepted causes, a sum should be paid, which should bear such a proportion to the whole amount as the matured life expectancy should bear to the entire expectancy at the date of admission into the endowment rank. Under these provisions, assuming that death resulted from any of the excepted causes, the beneficiary would be entitled to one hundred and thirty eight dollars. The allegation in the answer is that Beck committed suicide and that his death resulted from voluntary self-destruction

whereby there accrued to the said beneficiary the sum of one hundred and thirty eight dollars which was tendered and refused. There is no suggestion that in consequence of death due to a violation or attempted violation of the criminal laws this amount was due to the beneficiary and tendered to her.

Section 690 of the Code of Civil Procedure of Montana provides as follows:

The answer of the defendant must contain:

1—"A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specially denied or admitted in the answer.

2—A statement of any new matter constituting a defense or counter claim."

Section 699, Code of Civil Procedure of Montana:

"A defendant may set forth in his answer as many defenses or counter claims or both as he has, whether they are such as were formerly denominated legal or equitable. *Each defense or counter claim must be seperately stated and numbered.* Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer."

If the violation or attempted violation of the law was intended as a defense it would no doubt be pleaded in conformity with the provisions cited. Most likely entertaining the view that the allegations in the proofs of death admitting suicide constituted practically an estoppel absolute reliance was placed upon that ground.

There is no waver of a defense that an answer does not state facts sufficient to constitute a defense, and

this defect may be urged in the appellate court for the first time.

Territory vs. Virginia Road Co., 2nd Mont., 100.

Gillette vs. Hibbard, 3 Mont., 419.

Largey vs. Sedman, 3 Mont., 476.

Foster vs. Wilson, 5 Mont., 57.

Milligan vs. Savery, 6 Mont., 131.

Quirk vs. Clark, 7 Mont., 233.

Whiteside vs. Lebcher, 7 Mont. 478.

Raymond vs. Wimsette, 12 Mont., 557.

Let us more critically examine the allegation. It is as follows: (7) "That prior to said Beck taking his own life said Beck was attempting and did violate a criminal law of the State of Montana."

Supposing he was or did. That is no defense. To be effective as a defense death must have been caused or superinduced by or through the violation or attempted violation of a criminal law. It is a settled rule of practice that a pleading should be construed most strongly against the pleader.

Boley vs. Griswold, 2 Mont., 450.

If this were intended as a defense the law that he violated or attempted to violate would undoubtedly be set forth. As it appears, it is merely a legal conclusion. If this were intended as a separate defense surely at some stage of the trial the application to amend would be interposed, and the jury and the court and the opposing party would be apprised as to what particular law had been violated rather than be invited to a consideration of the entire criminal code of the State of Montana as outlined in the brief of plaintiff in

error, pages 51, 52 and 53. It is insisted that a waver has occurred by reason of failure to interpose a motion or demurrer. As already seen a waver of a defect such as here presents itself could not take place. A fair and reasonable construction of the pleading connects this allegation with the defense of suicide. It was not improper to allege it in connection with that defense. The fact that he violated or attempted to violate the law would be pertinent to consider as to the likelihood as to whether the death was the result of suicide. It is only proper then to consider this allegation as attempting to sustain the theory of suicide and undoubtedly for that and for no other purpose does it appear in the pleading.

Assuming that such a defense could be considered was there evidence to warrant its consideration by the jury.

Death must clearly appear to have been the natural and legitimate consequence of the violation of the law.

Bradley vs. Mutual Benefit L. Ins. Co., 45 N. Y., 422.

Griffin vs. Western Mutual Benefit Association, 20 Neb., 620.

The act in violation of law and the act causing death must be part of the same continuous transaction.

Cooke on Life Ins., Sec. 48.

The wrongful act must be the proximate cause of death.

Bacon Ben. Soc. and L. Ins., Sec. 339.

Goetzman vs. Conn. Mut. L. Ins. Co., 3 Hun., 515.

Harper vs. Phoenix Ins. Co., 19 N. W., 506.

Overton vs. St. Louis Mut. L. Ins. Co., 39 Mo., 122.

There must be some causative connection between the act which constitutes the violation of law and the death of the insured.

Jones vs. Accident Association, 92 Iowa, 652.

Whatever construction may be put upon the conduct of the decedent early in the evening it is too palpable that when he met his death there was no criminal law of the state that he was violating. We strenously insist however that the consideration of this feature of the case is unwarranted under the pleadings.

The judgment appealed from should be affirmed.

C. B. NOLAN,

Attorney for defendant in error.

Supreme Court of the United States.

No. 194.—October Term, 1900.

The Supreme Lodge, Knights of Pythias of the World, Plaintiff in Error, vs. Lillian H. Beck. } In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 8, 1901.]

On April 5, 1895, a certificate of membership, in the amount of $3,000, was issued by the plaintiff in error to Frank E. Beck, payable on his death to his widow, Lillian H. Beck. The application for membership contained this stipulation:

"It is agreed that, if death shall result by suicide, whether sane or insane, voluntary or involuntary, or if death is caused or superinduced by the use of intoxicating liquors or by the use of narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation of or attempt to violate any criminal law, then there shall be paid only such a sum in proportion to the whole amount of the certificate as the matured life expectancy at the time of such death is to the entire expectancy at date of acceptance of the application by the board of control."

On October 31, 1896, he was killed by the discharge of a gun at the time held in his hands. After his death a coroner's jury found that he died "by shooting himself in the head with a double-barrel shotgun, with the purpose and intent of committing suicide, while temporarily insane, due probably to the use of intoxicants. That the shooting was done in the outside water closet of the premises now occupied by the family of C. B. Nolan, and that he threatened to kill his wife before killing himself." Proofs of death were furnished by his widow, in which question 14 and answer were as follows: "14. Was death caused by suicide or violence or from other than natural causes? A. Suicide."

On April 13, 1897, an action was commenced in the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark, by his widow to recover $3,000, the amount of the insurance. This action was removed by the defendant to the Circuit Court of the United States for the District of Montana. The answer set up specifically that the insured died from "self-destruction and suicide," and further, "that prior to said Beck taking his own life said Beck was attempting to and did violate the criminal laws of the State of Montana." In the Circuit Court a trial was had, which resulted in a verdict and judgment for plaintiff. The judgment was taken by the defendant to the United States

Circuit Court of Appeals for the Ninth Circuit, and by that court affirmed May 16, 1899, (36 C. C. A. 467,) to reverse which judgment of affirmance this writ of error was sued out.

Mr. Justice BREWER delivered the opinion of the Court.

The principal question discussed by counsel for plaintiff in error, and the important question in the case, is whether the trial court erred in refusing a peremptory instruction to find a verdict for the defendant. It is said that the testimony established the fact of suicide, and that there was no sufficient doubt in respect thereto to justify a submission of the question to a jury. We have recently had before us a case coming, like this, from the trial court, through the Court of Appeals, (*Patton* v. *Texas & Pacific Railway Company*, 179 U. S. 658,) in which the action of the trial court in directing a verdict was vigorously attacked as an invasion of the province of the jury to determine every question of fact. That case stands over against this, for there the trial court directed a verdict. Here it refused to direct one. In each case its action was approved by the Court of Appeals. In that case, although the question was doubtful, we sustained the rulings of the lower courts, and the considerations which then controlled us compel a like action in the present case. We said that a trial court had the right, under certain conditions, to direct a verdict one way or the other, (citing several cases to that effect,) but added:

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. (*Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43.)

"Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions." (p. 660.)

Whether the deceased committed suicide was a question of fact, and a jury is the proper trier of such questions. It is not absolutely certain that the deceased committed suicide. The following are the facts, at least, from the testimony, the jury was warranted in finding them to be the facts:

The deceased and his wife had been married some six years. They had one child, a little girl, of whom he was very fond. They lived happily together except when he was drinking, and then he became irritable, and they quarreled. For six weeks prior and up to four days before his death he had not been drinking. The only evidence that he ever thought of taking his life is the testimony of a domestic, who had worked in the family for two or three years but had left a year and four months before his death, that when once she called his attention to the fact that he was drinking heavily, his reply was that "a man that has as much trouble as he had, the sooner the end came the better," and a similar remark at another time, that such a man "would be better off dead than living." Two days before his death his wife left her home and went to a neighbor's. He tried to persuade her to return, but she refused to do so while he was drinking. There were two guns in his house, one a single barrel shotgun, belonging to his wife, and one a double barrel shotgun, his own. The domestic then employed had concealed both by direction of Mrs. Beck. The day before the killing he went to a store in the city and hired a gun. He was at home the day of his death, sleeping a good deal. Late in the afternoon he got up and called for his gun, saying he was going hunting. Evidently he got his own gun or the gun he had hired the day before. In the evening he went to the house where his wife was staying and sought admission. A friend was with him. Admission was refused. He became demonstrative, and a call was made for a policeman, who soon came in a hack. The breaking of glass suggested that he had gotten into the house. The policeman went inside, when the hack driver, who had brought the policeman, called out that the deceased had gone into the back yard and into a water closet. The hack driver heard him go into the closet, and after a minute or so heard him step outside, and immediately the gun was discharged, and on examination he was found with the upper part of his head shot off. It was so dark that no one saw the circumstances of the shooting. Whether it was accidental or intentional is a matter of surmise. The undertaker testified that there was a mark on the face under the left eye as though the face had been pressed to the barrel of the gun; that there were no powder marks on the face as there would have been had the gun not been held close to the skin. But whether that mark, if it came from the gun, was because he deliberately placed his head on the top of the gun, or, as a drunken man, stumbled and fell against it, is a matter of conjecture. There was a dispute as to whether, in view of the length of the gun and the shortness of his arm, he could have reached the trigger without the aid of a pencil or piece of wood, no trace of which was found, or indeed looked for. Under those circumstances it is impossible to say that beyond dispute he committed suicide. The discharge of the gun may as well have happened from the careless conduct of a drunken man as from

an intentional act. At any rate, the question was one of fact, and the jury found that he did not commit suicide, and after its finding has been approved by the trial court and the Court of Appeals we are not justified in disturbing it.

Neither can it be said that death came "in violation of or attempt to violate any criminal law." Before he left home with the gun he said he was going hunting. While from his conduct he apparently changed his mind, and doubtless went to the house where his wife was stopping with the view of persuading or compelling her to return home, and may have intended violence against her if she refused, yet the death resulted not as a consequence of any violation or attempt to violate the criminal law. In this respect the court charged the jury as follows:

"Here is an instruction asked which I refuse, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed he cannot recover. But if a man contemplating that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply."

This instruction correctly states the law. The death must in some way come as a consequence of the violation or attempted violation of the criminal law, and the stipulation does not apply when it is simply contemporaneous and in no manner connected with the alleged violation or attempt to violate. For instance, if the deceased had started with the avowed intent to kill his wife, and while walking down the street a tree had fallen and killed him, the fact that he was starting upon an intentional violation of the law would not make this stipulation applicable, because the cause of his death would be entirely disconnected from the criminal act. So here, whatever may have been the general thought and purpose running in his mind as he went to the house where his wife was, his act in going into and stepping out of the water closet was in no manner connected with or part of an attempt to carry out any criminal purpose, and at that time came the shot, intentional or accidental, which killed him.

These are the substantial matters presented in the record. There are one or two minor questions. For instance, when the undertaker was on the witness stand, the defendant produced a gun and asked him to show the jury how the mark which he said he found on the face of the deceased could be caused, and the gun was used for that purpose. On cross-examination it appeared that his arm was not long enough to reach the trigger, and, therefore, to fire it off in the position in which he had placed it he needed a pencil or something of that kind. Subsequently, the plaintiff

introduced testimony tending to show the length of the arm of the deceased and the improbability of his being able to reach the trigger, with his face on the muzzle, as described by the undertaker, which testimony was objected to on the ground that the gun had not been identified as the one which had caused the death, but the objection was overruled and the testimony admitted. There was testimony subsequently offered by her as to its identity, but that testimony was, to say the least, not clear and satisfactory, so that it cannot be said that the gun was fully identified as the one which caused his death. Still, we cannot think that this furnishes a sufficient ground for reversing the judgment. The defendant produced the gun, and while it cannot be said that the mere production carried with it a declaration that this was the gun which caused the death, yet it certainly suggested the fact, and if not so it ought to have offered testimony to that effect. It presented the gun for use and illustration before the jury, and there was no material error in permitting the plaintiff to use the same gun for the purposes of other illustration, especially when she followed that with testimony tending, although, perhaps, only slightly, to identify it.

Another matter is this: The plaintiff in her proofs of loss stated that the deceased came to his death by suicide, and to that effect was the verdict of the coroner's jury. With respect to this matter the court charged that there was no estoppel; that the plaintiff could explain the circumstances under which she signed the statement, and that while standing alone it would justify a verdict for the defendant, yet if explained and the jury were satisfied that the death did not arise from suicide, she was not concluded by this declaration. We see no error in this ruling. None of the elements of estoppel enter into the declaration. The condition of the defendant was not changed by it, and if under a misapprehension of facts she made a statement which was not in fact true, she could explain the circumstances under which she made the statement and introduce testimony to establish the truth.

Some other matters are mentioned in the brief of plaintiff in error, but nothing that we deem of sufficient importance to deserve notice, We see no error in the judgment, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.